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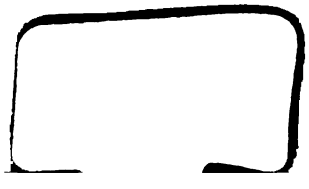

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

DURING

EASTER AND TRINITY TERMS, NINTH GEO. IV.

BY

JAMES MANNING, Esq. of Lincoln's Inn,

AND

ARCHER RYLAND, Esq. of Gray's Inn,

BARRISTERS AT LAW.

VOL. II.

WITH AN INDEX,

AND

TABLE OF PRINCIPAL MATTERS.

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ERRATA.

Page 235, note (a), *for* " vide note A at the end of this volume," *read* " vide note A at the end of vol. iii."

481, marginal note, *for* " defendant's costs," *read* " plaintiff's costs.

511, note (c), *for* " 41 E. 3. fo. 3, pl. 4," *read* " 41 E. 3. fo. 13, pl. 4."

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

EASTER TERM,

IN THE NINTH YEAR OF THE REIGN OF GEORGE IV.

SMITH *v.* LAWRENCE.

1828.

A., the owner of a carriage, hired four post horses and two postilions of *B.*, a livery stable keeper, for the day, to take him from London to Epsom and back. In returning, the postilions damaged the carriage of *C.*: —Held, that *B.*, as owner of the horses, and master of the postilions, was liable to *C.* for such damage.

THIS was an action on the case for an injury done to the plaintiff's horse and gig through the negligence of the defendant's servants. Plea, not guilty. At the trial before Lord *Tenterden*, C. J., at the last Guildhall Sittings, the case was this:—The defendant was a livery stable keeper, and on the day when the accident in question occurred, had let out to a Mr. ———— four post-horses, which he sent to his house with two of his postilions. The horses were hired for the day, for the purpose of drawing Mr. ————'s carriage to Epsom races and back, which they did, being driven and managed entirely by the defendant's servants. On their return the defendant's servants drove against the plaintiff's gig, and occasioned the damage complained of. The plaintiff obtained a verdict.

F. Kelly moved for a rule nisi to set aside the verdict, and enter a nonsuit. This action is not maintainable against the defendant, the owner of the horses, but ought to have been brought against the owner of the carriage, to whom the horses were let out for the day. The question is, whose servants the postilions are in point of *law* to b

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SMITH v. LAWRENCE.

deemed, at the time when the accident happened. In point of *fact*, undoubtedly, they were the servants, generally speaking, of the defendant, the livery stable keeper; but in point of law it is submitted that they were, for the day, the servants of the person by whom they and the horses were hired for that day; and that he, and not the defendant, is liable for the consequences of their acts. Neither the men, nor the horses, were in the possession, or under the control, of the defendant during the day in question; therefore the allegation in the declaration that the defendant was possessed of the horses, is not borne out by the fact. The case most like the present, and indeed hardly distinguishable from it, is that of *Laugher* v. *Pointer* (*a*); but there, unfortunately, the Judges of this Court were equally divided in opinion upon this very question. [*Bayley*, J. This is a somewhat different case from that. The horses there were job horses; here they are post horses, which in point of law, I conceive, are taken never to be out of the possession of their actual owner, and over which, therefore, the hirer has no sort of control.] The preponderance of opinion in the several cases seems to be, that the owner of a carriage, hiring horses and servants to draw and drive it, is liable for their acts; and if he is, the owner of the horses cannot be: if, as *Littledale*, J. observed in *Laugher* v. *Pointer*, "if one party be liable, the other cannot." At least the point requires further consideration.

Lord TENTERDEN, C. J.—Adhering to the opinion which I, upon deliberation, formed in the case of *Laugher* v. *Pointer*, from which I do not consider this case, in substance, distinguishable, I think the present defendant, as the owner of the horses, is liable.

HOLROYD, J. (*b*).—I think the present case distinguishable from the former, in the particular pointed out by my

(*a*) 8 D. & R. 556; 5 B. & C. 547.

(*b*) *Bayley*, J. had gone to chambers.

brother *Bayley*. The horses and servants here, though hired out to the owner of the carriage for a particular purpose, were still, in point of law, in the possession and under the control of the defendant. The hirer had no control or authority over them. The defendant was their owner and master, and is responsible for their acts.

LITTLEDALE, J.—I retain the opinion which I expressed in the former case; and I think this a still stronger case than that against the owner of the horses. In my judgment, the period for which the horses are hired is immaterial. I am clearly of opinion that the defendant is liable.

Rule refused.

BRUCE *v.* RULER.

Where *A.*, at the request of *B.*, his yearly tenant, accepted *C.* as tenant in his stead, who proved to be insolvent, and it appeared that *B.*, when he proposed *C.* to *A.*, knew that *C.* had compounded with his creditors, but did not communicate that fact to *A.*:—Held, that the suppression of such a fact was a fraud in *B.*, which rendered him still liable to *A.* for the rent.

ASSUMPSIT for the use and occupation of a dwelling-house. At the trial before *Bayley*, J., at the last York assizes, the question was, whether there had been a valid surrender of the premises by the defendant by operation of law, previously to the quarter for the rent of which the action was brought, or not. The circumstances were these:—The defendant had occupied the premises as tenant from year to year to the plaintiff. Just before the expiration of one quarter, he told the plaintiff he wished to quit the premises, and proposed to him another tenant, whom he wished him to accept in his stead. The plaintiff accepted the new tenant, who took possession of the premises; but he proved to be insolvent, and could pay no rent. The defendant knew, when he proposed the new tenant to the plaintiff, that the former had compounded with his creditors, but did not communicate that fact to the plaintiff; nor did the plaintiff ask him any question upon the subject. The

1828.

BRUCE v. RULER.

learned judge told the jury that he considered the defendant's suppression of the fact of the new tenant's insolvency was such a fraud upon the plaintiff, as vitiated the surrender of the premises, and left the defendant still liable for the rent; and the jury, under that direction, found a verdict for the plaintiff.

E. Alderson moved for a rule nisi for a new trial, upon the ground that the learned judge had misdirected the jury in point of law. There was no fraud in this case; therefore the surrender of the premises was binding, and the defendant was not liable for the rent. In order to raise the question of fraud, so as to render a party liable, who but for that fraud would not be liable, there must be either a wrongful act done, or a duty neglected, by the party. Here, there was neither the one nor the other. There was clearly not the first, because there was no representation made favourable to the new tenant, as regarded his circumstances; and with respect to the second, it seems difficult to say that the defendant was guilty of any breach of duty. If the plaintiff had asked him any question relative to the circumstances of the new tenant, it would, undoubtedly, have been his duty to have stated, fully and frankly, all he knew; and any suppression in that case would have amounted to a fraud. But it was not his duty to volunteer the communication of a fact which it might have been injurious to the party to have divulged, and respecting which no inquiry was made.

BAYLEY, J.—I thought at the trial that it was to be presumed, that if the plaintiff had known this fact with respect to the new tenant's circumstances, which the defendant knew and might have communicated to him, but did not, he would not have accepted him as a tenant; and therefore that the keeping back that fact was, legally speaking, a fraud, which rendered the defendant liable in this action.

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BRUCE v. RULER.

Lord TENTERDEN, C. J.—And I think so now. If I had tried the cause, I have no doubt I should have given a similar direction to the jury.

BAYLEY, J.—It is very desirable, if possible, to *make* people honest.

HOLROYD, J.—I think it was clearly a fraud.

LITTLEDALE, J. concurred.

Rule refused.

MAUGHAM *v.* HUBBARD and another, Assignees of LANCASTER, a Bankrupt.

In an action against assignees to recover money wrongfully paid them, the debt having been previously paid to the bankrupt, the latter stated, that, from looking at an entry of his own in the plaintiff's book, he had no doubt whatever he had received the money:—Held, sufficient proof of the payment without producing the book.

The entry in the book was, "*R. L.*," the bankrupt's initials, "£26, *Maugham*," the plaintiff's name:—Held, that the bankrupt might speak from his recollection of the entry in the book, as having refreshed his memory, though the book could not be used as evidence for want of a receipt stamp.

ASSUMPSIT for money had and received by the defendants to the plaintiff's use. Plea, non assumpsit, and issue thereon. At the trial before Lord *Tenterden*, C. J., at the last Guildhall Sittings, it appeared that a commission of bankruptcy having issued against *Lancaster* in the year 1826, the plaintiff, who had had dealings with him, and who believed that he owed him a sum of 26*l.*, paid that sum to his assignees. Upon subsequently examining his own books, the plaintiff discovered in one of them an entry of this debt, against which was written, "*R. L.* £26. *Maugham*;" and *Lancaster*, upon seeing that entry, recognized it as being in his own handwriting, and stated that from seeing that entry he had no doubt he had received the money. It was objected for the defendants that the proof of the original payment to *Lancaster* was insufficient, because he knew nothing of the receipt of the money except from the entry in the plaintiff's book, which entry being, if it was anything, or evidence at all, an informal receipt, was

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MAUGHAM v. HUBBARD.

not receivable in evidence unless the book had been stamped. The objection, however, was overruled by the Lord Chief Justice, and there being no other defence, the plaintiff had a verdict.

Robinson now moved for a rule nisi to set aside the verdict and to enter a nonsuit, and renewed the objection. There was no sufficient proof of the supposed original payment of the money by the plaintiff to the bankrupt. The bankrupt, who was the only witness upon the subject, admitted that he knew nothing of the fact of the money having been paid to him, except from seeing his own memorandum of the receipt of it in the plaintiff's book. He had, therefore, no knowledge upon the subject that could be communicated as evidence; for the book from which his knowledge came was itself not evidence. The entry in the book, if it was anything, was a receipt; therefore the book could not properly be produced or used at all, without a receipt stamp. *Jacob* v. *Lindsay* (*a*) is decisive of the point. There the plaintiff had entered an account, in writing, of goods and cash furnished to the defendant from time to time, each page of which was authenticated by the defendant's acknowledgment, in writing, of the receipt of the contents; and it was held that such acknowledgments could not be given in evidence, for want of receipt stamps (*b*). And in *Hawkins* v. *Warre* (*c*), an action of replevin, the issue being, whether the plaintiff held certain closes at a fixed rent, specified in the avowry, it was held, that unstamped receipts, tending to shew that the plaintiff had previously paid for the same premises the like rent so specified, were inadmissible to support the issue. Then, without the book there was no proof at all of the payment, because, independently of the book, the bankrupt knew nothing about it; and the rule is, that a witness may refresh

(*a*) 1 East, 460.

(*b*) But it was also there held that the witness might refresh his memory by referring to the accounts.

(*c*) 5 D. & R. 512; 3 B. & C. 690.

his memory by any book or paper, if he can afterwards swear to the fact from his own recollection; but if he cannot swear to the fact from recollection, any farther than as finding it entered in a book or paper, the original book or paper must be produced. *Doe* v. *Perkins* (*a*).

Lord TENTERDEN, C. J.—The bankrupt, upon looking at the plaintiff's book, said, that seeing his own initials to the receipt there, *he had no doubt whatever* that he had received the money. I think that amounted to a statement that he knew and recollected, independently of the book, that the money had been paid to him. If that be so, the question with respect to the stamp becomes immaterial, because then the book may be regarded as used only for the purpose of refreshing the witness's memory, which it was allowable to do, though it had no stamp. If it had been wished to use the book as evidence *per se*, it would undoubtedly have required a receipt stamp, because the entry amounted to a receipt in meaning.

BAYLEY, J.—I think there was sufficient evidence of the payment of the money by the mouth of the witness, without using the book for any other purpose than refreshing his memory, for which purpose it was clearly admissible. In proving the execution of a deed, the attesting witness frequently states that he does not recollect the fact of the deed being executed in his presence, but that seeing his own signature to it, he has no doubt he saw it executed; and yet that has always been received as sufficient proof of the execution.

The other Judges concurred.

Rule refused.

(*a*) 3 T. R. 749. And see *Tanner* v. *Taylor*, ibid. 755; *Kensington* v. *Inglis*, 8 East, 278; *Henry* v. *Lee*, 2 Chit. Rep. 124; *Burrough* v. *Martin*, 2 Campb. 112.

1828.

EAST *v.* ——.

A promissory note for 11*l.*10*s.*, made payable "on demand, to the bearer, with interest, for value received," requires a 2*s.* stamp by 55 *Geo.* 3, c. 184, Schedule, part 1.

ASSUMPSIT on a promissory note, in these words:—"On demand, I promise to pay the bearer hereof the sum of 11*l.* 10*s.*, with interest, for value received." At the trial before *Park*, J., at the last assizes, the note, when produced, appeared to bear a 1*s.* 6*d.* stamp. It was contended on the part of the defendant, that it ought to have borne a 2*s.* stamp, to satisfy the provisions of the 55 *Geo.* 3, c. 184, Sched. part 1, tit. "Promissory note," the words of which were, "Promissory note for the payment to the *bearer, on demand,* of any sum of money exceeding £10, and not exceeding £20,—2*s.*; which said notes may be re-issued, after payment thereof, as often as shall be thought fit." The learned Judge considered the objection valid, and accordingly nonsuited the plaintiff.

W. E. Taunton now moved for a rule nisi to set aside the nonsuit, and for a new trial. This is not a re-issuable note within the meaning of the statute, which was clearly intended to apply to bankers' notes only. Section 14 enacts that "it shall be lawful for any banker or bankers, or other person or persons, who shall have made and issued any promissory notes for the payment to the bearer, on demand, of any sum," &c. "duly stamped according to the directions of this act, to re-issue the same," &c. This is not such a note as is there described; for, first, it has never been *issued* within the meaning of the statute, and therefore never can be *re-issued;* and, secondly, it is not "duly stamped according to the directions of this act," and for that reason can never be re-issued. Section 24 provides that no re-issuable notes shall be issued by any person, "without taking out a licence yearly for that purpose," and that "every such licence shall specify the name of the person to whom the same shall be granted." Section 27 provides, that every person applying for such licence "shall

produce and leave with the proper officer a specimen of the promissory notes proposed to be issued by him;" and imposes a penalty of 100*l.* upon every person who shall infringe either of those provisions. Now these enactments, coupled with the schedule, plainly shew that bankers' notes are the only notes intended. A bill of exchange, of the amount of this note, requires only a 1*s.* 6*d.* stamp; nor can there be any good reason why a promissory note should stand on a different footing.

Lord TENTERDEN, C. J.—In the description given by the schedule of bills of exchange, there is some limitation of the time at which they are payable; they are all described as payable so many days or months after date or sight, and the stamp varies in amount accordingly. But in this promissory note there is no fixed, limited time for payment; it is payable *on demand*. It is also payable *to bearer*, and does, as it seems to me, fall within the description of the part of the schedule referred to, and consequently ought to bear a 2*s.* stamp. If it did not come within the operation of this part of the schedule, it would be left out altogether. It may be some hardship upon the plaintiff thus to decide; but parties should not deal with promissory notes framed in this unguarded way; and having done so, the plaintiff must abide the consequences.

The other Judges concurred.

Rule refused (*a*)

(*a*) See *Whitlock* v. *Underwood*, 3 D. & R. 356. There the language of a promissory note was, "I promise to pay Mr. *Whitlock, or bearer*, the sum of 40*l.*, value received, with interest;" and it was held that the note was in legal effect payable *on demand*, and therefore required a 5*s.* stamp by the 55 *Geo.* 3, c. 184, Schedule, part 1; and see 2 B. & C. 157, *S. C.*

1828.

LANGDON *v.* WILSON, *Gent. one, &c.*

"I have received a bill of exchange, which I hold as your attorney, to recover the value of from the parties, or to make such other arrangement for your benefit as may appear to me, in my professional character, reasonable and proper," is not an agreement or a receipt, and may be read in evidence without *any* stamp.

ASSUMPSIT. The first count of the declaration stated, that in consideration that plaintiff would retain and employ defendant as his attorney, and would deliver to him, defendant, a certain bill of exchange, drawn by *W. Patterson* upon and accepted by *T. Harrison*, for the payment of £300, at six months after the date thereof, and indorsed by Sir *P. Bagot* to plaintiff, in order that he, defendant, might recover the amount of the said bill of exchange from the respective parties liable to pay the same to plaintiff, or make such other arrangement for the benefit of plaintiff as might appear to him, defendant, in his professional capacity, reasonable and proper; defendant undertook, &c., to do and perform his duty as such attorney, and to use and employ reasonable and proper care and diligence in and about the endeavouring to recover the amount of the bill, and to re-deliver the bill to plaintiff. Averment, that the bill was delivered to defendant. Breach, that defendant did not use reasonable diligence to recover the amount of the bill, nor make any arrangement for the benefit of plaintiff, nor re-deliver the bill to plaintiff. There was a second count against the defendant as indorser of the bill. Plea, non assumpsit, and issue thereon. At the trial before Lord *Tenterden*, C. J. at the London adjourned sittings after last Trinity term (*a*), the plaintiff tendered in evidence the following letter signed by the defendant, and addressed by him to the plaintiff:—

"I have this day received a bill of exchange for £300, drawn by one *Patterson* upon *Thomas Harrison*, bearing my indorsement, and the indorsement of Sir *Paul Bagot*, which I hold as your attorney, to recover the value of from the respective parties, or to make such other arrangement for your benefit, as may appear to me, in my professional capacity, reasonable and proper.—Nov. 15, 1825."

This paper not being stamped, it was objected, on the

(*a*) Counsel for the plaintiff, *Scarlett* and *Comyn*; for the defendant, *Campbell* and *Patteson*.

part of the defendant, that it could not be received in evidence, inasmuch as, if it was any thing at all, it amounted to an agreement, and required a proper agreement stamp. The Lord Chief Justice overruled the objection, and a verdict was found for the plaintiff on the second count. In Michaelmas term last *Campbell* obtained a rule nisi, pursuant to leave granted at the trial, to enter a nonsuit, upon the ground that the paper was not receivable in evidence for want of a stamp, and that without it there was no evidence of the defendant's having notice of the dishonour of the bill, so as to make him liable as the indorser.

Scarlett and *Comyn* shewed cause. The paper required no stamp. It was not an agreement, or undertaking, to do any thing; it was a mere memorandum, or acknowledgment by the defendant that he had received the bill from the plaintiff, and held it to his use. *Watkins* v. *Hewlett* (*a*) is decisive to shew that this paper did not require an *agreement* stamp. There an instrument was given by an overseer to the reputed father of a bastard child, stating that he had received a sum of money from the latter by a bill of exchange, which would exonerate him from the expenses attending the birth, &c. of the child; and it was held not to require an agreement stamp. It is equally clear that this document did not require a *receipt* stamp, *Tomkins* v. *Ashby* (*b*), where it was decided that no instrument requires a receipt stamp, which does not operate by way of discharging an existing debt, which this clearly does not.

Campbell and *Patteson* contrà. The paper in question amounted to an agreement, and required a stamp accordingly. At least, it was evidence of a contract between the parties, and was produced for the purpose of proving the undertaking set out in the first count of the declaration.

(*a*) 3 J. B. Moore, 211. 1 Bro. & B. 1. And see Latham v. Rutley, 1 Ry. & M. 13; Chadwick v. Sills, 1 Ry. & M. 15; Mullett v. Hutchison, ante, i. 522.

(*b*) 6 B. & C. 541.

1828.

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If it had been signed by both parties, it would clearly have constituted an agreement, and have required a stamp; and being signed by one, and addressed to the other, it was at least an undertaking, which equally required to be stamped.

Lord TENTERDEN, C. J.—I am clearly of opinion that this paper was neither an agreement, nor evidence of a contract, requiring a stamp, within the meaning of the 55 *Geo.* 3, c. 184, sched. pt. 1. It was a mere acknowledgment by an attorney of the duty which he had taken upon himself to perform for his client. This rule, therefore, must be discharged.

The other Judges concurred.

Rule discharged.

The KING v. *The City of* LONDON GAS LIGHT *and* COKE COMPANY.

Houses built on lands embanked from the Thames, in pursuance of the statute 7 *Geo.* 3, c. 37, which vests those lands in the owners, "free from all taxes and assessments whatsoever," are not liable to be rated for the relief of the poor.

BY a certain rate or assessment duly made and allowed by two justices of the peace for the city of London, on the 22d of September, 1826, on the several inhabitants and others, and every occupier of lands, houses, shops, warehouses, and other tenements or hereditaments within the parish of St. Bridget, otherwise St. Bride, in the ward of Farringdon Without, in the city of London, for and towards the relief, maintenance, and employment of the poor of the same parish, from Midsummer-day then last past to Michaelmas-day then next ensuing, the said rate being a rate or assessment of 1*s.* 6*d.* in the pound upon the annual rent or value of the said lands, houses, shops, warehouses, and other tenements or hereditaments of and in the same parish, as far as the same could be ascertained; the city of London Gas Light and Coke Company were rated as follows:—

£.		£.	s.	d.
1,200	"The City of London Gas Light and Coke Company, for houses, sheds, and premises, *Daniel Benham*, Secretary, resident	90	0	0
12	"The same, for houses and premises, *Daniel Benham*	0	18	0
24	"The same, for houses and premises, *Daniel Benham*	1	16	0"

Against this rate the said Company appealed to the next general quarter sessions, holden in and for the city of London, on the 18th January, 1827, when that Court confirmed the rate, subject to the opinion of this Court upon the following case:

The premises for which the said Company are rated and charged at the sum of £90, upon the annual rental or value of £1,200, consist of a wharf, buildings, and premises, abutting on the river Thames near Blackfriars Bridge, held by the Company under a lease granted by the New River Company; a part of which premises is in the parish of St. Bridget, otherwise St. Bride, and liable to be rated thereto, at the sum of £60 upon the annual rental or value of £800; and the remaining part of such buildings, together with the wharf and premises, covering and comprising a space of 22,642 feet, superficial measure, which are assessed in the said rate upon the annual rental or value of £400, and from which the City of London Gas Light and Coke Company claim to be exempted, are built upon ground and soil which were formerly part of the ground and soil of the river Thames, and were inclosed and embanked by the New River Company, and became vested in the City of London Gas Light and Coke Company as lessees (for a term yet unexpired), together with the adjoining wharf and ground, in front of which the said ground and soil of the said river were so inclosed and embanked. The inclosure and embankment were made by the New River Company under the authority of an act of parliament, 7 *Geo.* 3, c. 37; which act is annexed to and forms

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part of this case. The sections of this statute which are material for the consideration of the Court, are the 1st, 2d, 52d, 53d, 54th, 56th, 57th, and 60th.

A quit rent, amounting to 23*l.* 11*s.* 8½*d.* per annum, payable by virtue of the said act, for the land so embanked as aforesaid, was redeemed by the New River Company in the year 1769, for the sum of 471*l.* 14*s.* 2*d.*

An act of parliament, passed 39 *Geo.* 3, entitled, "An Act for the better Relief and Employment of the Poor of the Parish of St. Bridget, otherwise St. Bride, Fleet Street, in the City of London," which act is annexed to and forms part of this case. The sections of this act which are material for the consideration of the Court, are the 17th and 18th.

An act of parliament was passed, 7 *Geo.* 4, entitled, "An Act to amend an Act of his late Majesty, for the better Relief and Employment of the Poor of the Parish of St. Bridget, otherwise St. Bride, Fleet Street, in the City of London," and which act is annexed to and forms part of this case. The sections of this statute material for the consideration of the Court, are the 38th and 39th.

The New River Company, while in possession of the ground and soil for which the exemption is now claimed by the London Gas Light and Coke Company, were for several years regularly rated to the poor rate of the said parish of St. Bridget, otherwise St. Bride, in respect of the same, and of the buildings erected thereon, and paid their rates: and the London Gas Light and Coke Company, having become possessed of the said ground and soil, about eight years since, were for several years regularly rated to the poor rate of the said parish in respect of the same, and of the buildings erected thereon, and regularly paid their rates until the year 1825, when a new and higher assessment having been made, they objected to the rate, and claimed a total exemption.

The question for the opinion of the Court is, whether the said land, comprising the said space of 22,642 superfi-

cial feet, comprising the said wharf and premises and the several buildings erected thereon, and which are assessed in the said rate upon the annual rental or value of £400, are liable to be rated to the relief of the poor of the said parish of St. Bridget, otherwise St. Bride. If the Court shall be of opinion in the affirmative, the rate is to be confirmed; if otherwise, the rate is to be amended by striking out the said sums of 1,200*l.* and 90*l.*, and inserting instead thereof the sums of 800*l.* and 60*l.*

Brodrick, in support of the Order of Sessions.—The enactments upon which the question in this case mainly depends, are the first, second, and fifty-first sections of the 7 *Geo.* 3, c. 37. By the first, the City of London are required to inclose and embank certain portions of the ground and soil of the River Thames, for the purposes of the completion of Blackfriars Bridge. By the second, the owners and proprietors of wharfs or grounds abutting on the river, are empowered, upon giving certain notices to the city, to inclose and embank so much of the said ground and soil of the river as lies opposite and contiguous to their respective wharfs or grounds, at their own expense. And by the fifty-first, it is enacted, "that the ground and soil of the said river so to be inclosed and embanked in the front of every such respective wharf or ground, (and which shall be bounded on the east and west sides thereof, by straight lines running at right angles to and upon the said intended front line,) shall vest, and the same is hereby vested, in the owner or owners, proprietor or proprietors of such adjoining wharf or ground, according to his, her, or their respective estates, trusts, or interests therein, *free from all taxes and assessments whatsoever.*" The question is, whether this company, as the proprietors of the premises described in the case, and assessed in the rate, upon a rental of 400*l.* at 30*l.* a year, are, under the words "free from all taxes and assessments whatsoever," exempt from poor rates, in respect of those premises. It is submitted that they are

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not. It is found by the case, that the previous owners of the premises, and the Company themselves, have been regularly rated, and paid rates in respect of them, for a long course of years, down to the year 1825; therefore it is clear that down to that period they considered themselves liable, and that the idea of claiming an exemption has originated very recently and suddenly, upon the rate being raised. The true construction of the exemption in the statute seems to be, that it applies not to poor rates, or any other public or parochial taxes, but only to the local or district taxes peculiar to the city of London; and there are cases in the books which strongly support this argument. It was, indeed, held in *Williams* v. *Pritchard* (*a*), that houses built on lands embanked on the Thames, in pursuance of this statute, were not liable to be assessed to the general *land-tax* imposed by the 27 *Geo.* 3. But there the act imposing the tax was in general words. In *Perchard* v. *Heywood* (*b*), it was held, that this act of 7 *Geo.* 3, c. 37, did not exempt the occupiers of houses built on land embanked from the Thames, from the payment of the *house and window* duties imposed by the 38 *Geo.* 3, c. 40; and the words of that act, like those of the acts imposing the tax in this case, were express and comprehensive. It must be admitted, that the words of the act there were stronger than they are here, for there every exemption was expressly taken away, except certain exemptions expressly mentioned, "notwithstanding any former statute or statutes to the contrary;" but the decision of the Court does not seem to have proceeded on that ground, but on the ground that the tax was a personal charge, and not a tax on the land. Now that principle applies here. The poor rate is to be considered, not as a tax on the land, but as a personal

(*a*) 4 T. R. 2. And see *Eddington* v. *Borman*, 4 T. R. 4, where it was held, that houses built on land embanked from the Thames in pursuance of the 7 *Geo.* 3, c. 37, were not liable to be assessed to the rates for *paving* in London, made under the 11 *Geo.* 3, c. 29.

(*b*) 8 T. R. 468.

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charge in respect of the land; it is a tax upon the occupier of the land, not upon the land itself: but the exemption is clearly from taxes upon the land, and construed strictly, as it ought to be, cannot extend to poor rates. The local acts imposing the poor rate, the 39 *Geo.* 3, c. 4, and 7 *Geo.* 4, c. 114, contain no such exemption as the 7 *Geo.* 3, c. 37, contains, and clearly impose the tax, not on the land, but on the occupier; for they authorize the making of "one general equal pound rate or assessment for and towards the relief of the poor, *upon all and every person and persons* who do or shall inhabit, hold, occupy, or enjoy any land, house, shop, warehouse, coach-house, stable, cellar, vault, or any other building, tenement or hereditament within the parish, and on *every other person and persons* who by law is, are, or shall be chargeable or liable to be assessed for or towards the relief of the poor." These acts, therefore, are inconsistent with the former act, giving the exemption; they cannot stand and be put in operation together: consequently the latter must be taken to operate as a repeal of the former. The rule of law upon this subject is clearly laid down by Lord *Coke* in *Foster*'s case (*a*). He says, "an act in the affirmative shall not repeal or abrogate a precedent affirmative law before: and the said rule that *leges posteriores priores contrarias abrogant*, was well argued. But as to this purpose, *contrarium est multiplex*. First, in quality, *scilicet*, if one is an express and material negative, and the last is an express and material affirmative; or if the first is affirmative, and the latter negative. Secondly, in matter, although both are affirmative; as by the statute of 33 *H.* 8, c. 23, it is enacted, that if any person, being examined before the king's council, or three of them, shall confess any treason, &c. he shall be tried in any county where the king pleases, by his commission, &c.: and afterwards another law was made, 1 & 2 *P.* & *M.* c. 10, in these words, that all trials hereafter to be had for any treason shall be had according to the course of the common law, *and not otherwise*. This

(*a*) 11 Co. Rep. 62, b.

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latter act (*although the latter words had not been*) hath abrogated the former, because they were contrary in matter." So Lord Chief Baron *Comyns* says, affirmative words do not take away the words of a former statute; "but where affirmative words in sense contain a negative, as where a new ordinance is made, which directs the form or order of the proceeding, it is otherwise" (*a*). The present case falls within that rule. The acts are contrary in matter, and therefore the former is repealed.

Bolland, contrà, was stopped by the Court.

Lord TENTERDEN, C. J.—I entertain no doubt upon this case. The only question is, whether the occupiers of premises built upon land embanked from the Thames, pursuant to the 7 *Geo.* 3, c. 37, are or are not exempt from the poor rates imposed by the subsequent statutes of 39 *Geo.* 3, c. 4, and 7 *Geo.* 4, c. 114. I am clearly of opinion that they are. The 7 *Geo.* 3. recites, that it would tend to remove many inconveniences, if the ground and soil of the river was inclosed and embanked, and then, after regulating the mode of the inclosure and embankment, enacts, that the ground and soil, when inclosed and embanked, shall vest in the owners of the adjoining wharfs or grounds, "free from all taxes and assessments whatsoever." The legislature therefore clearly contemplated a benefit arising to the public from the embankment on the one hand, and a benefit arising to the persons making the embankment, namely, an exemption from taxes, on the other. It has been decided, that this land is exempt from the land tax. Upon what principle then can it be contended, that though the land is exempt from the land tax, it is not exempt from the poor rate? The land tax is an assessment charged upon the inhabitants of a particular district; so is the poor rate: and it is equally immaterial to the government, in both cases, by what particular number or description of persons

(*a*) Com. Dig. *Parliament*, R. 25.

the assessment is paid, so that the amount required for the revenue is in fact levied and contributed. The embankment might reasonably be expected, and probably was found to be of advantage to the parish at large, and therefore it was reasonable that the exemption should be extended to the parish rates, and that the parish at large should consent to its being so extended. That being the state of the case under the first act of parliament, it does not appear to me that any alteration has been made by the subsequent statutes. The object of those acts was to establish a new mode of making the assessments in the parish, not to increase the subjects of assessment. The enumeration of the persons to be assessed is precisely the same in all the acts; and there can be no reason for holding, that acts made, not for the purpose of imposing a new burthen, but *alio intuitu*, as I have already mentioned, shall have that effect, or shall render persons liable to the payment of a rate from which they were previously exempt. But the case of *Perchard* v. *Heywood* (*a*), where it was decided that these premises were not exempt from the house and window duties, has been relied on, as an authority for saying that they are not exempt from poor rates. That case differs materially from the present. The tax in question there was one differing altogether in its nature from a poor rate. The house and window tax is a public and general assessment. Its object is to raise a sum from the nation at large, for national purposes, and it is of importance to the public that every house shall be rated to it, because the effect of some persons being exempt must necessarily be either to reduce the sum intended to be raised, or to increase the burthen upon those who are liable. These observations do not apply to a land tax or to a poor rate, therefore the case to which I have alluded does not govern the present. The recent decision in *Chatfield* v. *Ruston* (*b*), with respect

(*a*) 8 T. R. 468.

(*b*) 5 D. & R. 675; 3 B. & C. 863. And see *Rex* v. *Boldero*, 6 D. & R. 557; 4 B. & C. 467; *Rex* v. *Toms*, Doug. 401; *Rex* v. *Scott*, 3 T. R. 602.

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to a corn rent substituted in lieu of tithes, is very analogous to the present case. There, by a private inclosure act, the tithes of a parish were abolished, and in lieu thereof, a yearly money payment, by way of compensation, was directed to be made to the vicar, "free and clear of all rates, taxes and deductions whatsoever;" and it was held, that those words exempted the vicar from poor rates, in respect of the money so directed to be paid to him. In principle that case is the same as the present, and for these reasons I am of opinion that these parties are not liable to poor rates in respect of the premises built on the land embanked from the river, and therefore that the sessions were wrong in confirming the rate in that respect. It is singular that the occupiers of the premises should have submitted to the payment of the rate so long; but that circumstance cannot vary their right to exemption in point of law. The raising of the rate might naturally draw their attention to the question, whether they were really liable or not; and this parish affords an instance of the impolicy of striving to obtain too much, by which parties not unfrequently lose what they previously had, and which they might otherwise have been permitted to keep.

BAYLEY, J.—I am of the same opinion. It is quite clear that, under the 7 *Geo.* 3, these parties were exempt from the poor rate, and I see nothing in the subsequent acts to deprive them of that exemption. They were passed entirely *alio intuitu;* for the purpose of altering the mode of assessment, and for that purpose only. It was no part of their object to abrogate the exemption given by the former act, or to charge any parties that were not previously chargeable. They left the law precisely as it stood under the statute of *Elizabeth,* with respect to the persons to be rated to the relief of the poor. The words of exemption in *Chatfield* v. *Ruston* were not stronger in effect than the words of exemption here, and that case is in

principle a direct authority in favour of the present appellants.

HOLROYD, J., concurred.

LITTLEDALE, J., was absent.

Order of Sessions quashed, and the Rate amended by striking out the sums of 1,200*l.* and 90*l.*, and inserting the sums of 800*l.* and 60*l.*

The KING *v.* The Inhabitants of ASHBY-DE-LA-HAY.

No settlement can be acquired under 6 *Geo.* 4, c. 57, by renting a tenement, unless the entire rent for one whole year, whatever its amount, be actually paid.

BY an order of two justices, dated 22d May, 1827, *John Sneap, Hannah* his wife, and their five children, were removed from the township of Ashby-de-la-Hay to the township of Mugginton, both in the county of Derby; and the sessions, on appeal, quashed the order, subject to the opinion of this Court upon the following case:—

At Lady-day, 1825, the pauper, *John Sneap,* being legally settled in the township of Mugginton, hired a farm in Ashby-de-la-Hay by the year, at the rent of 54*l.* per annum, payable half-yearly. He held and resided upon the farm for more than twelve months, and he paid rent on account of the same to the amount of 40*l.*; but he did not pay a whole year's rent for the same prior to his becoming chargeable to, and his being removed by the township of Ashby-de-la-Hay. He was, prior to the 22d June, 1825, charged in respect of the farm in two poor assessments, and with the public levies or taxes of the township of Ashby-de-la-Hay; and applications were made to him for payment of such levies or taxes prior to the 22d June, 1825, but he did not pay the same till after the 10th July, 1825.

N. R. Clarke, in support of the Order of Sessions. The question is, whether the pauper acquired a settlement in

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Ashby-de-la-Hay, by renting a tenement in that township, pursuant to the provisions of the statute 6 *Geo.* 4, c. 57. The only doubt which can be raised upon that question is with respect to the payment of the rent, for it will not be denied that all the other requisites of the act were complied with. Now, it is submitted that a payment of 40*l.*, that being a sum exceeding 10*l.*, though not being the full amount of a year's rent, is a sufficient payment within the true construction of the statute. The former act of parliament, the 59 *Geo.* 3, c. 50, required that the tenement should be hired at 10*l.* a-year at least, for a whole year, and should be occupied, and the rent actually paid for a whole year, *by the person hiring*. The present act, 6 *Geo.* 4, c. 57, varies considerably from the former in its language. The latter requires that the tenement shall be rented at 10*l.* a-year, at least, for a whole year, and shall be occupied, and the rent, *to the amount of* 10*l.*, actually paid for a whole year. It has, undoubtedly, been held in the recent case of *Rex* v. *St. Lawrence, Ramsgate* (*a*), that payment of more than 10*l.*, part of the yearly rent of a tenement, is not a sufficient payment to entitle to a settlement under this statute; but that the whole rent, whatever its amount may be, must be paid. It is submitted that such a decision is likely to lead both to absurdity and inconvenience, and that the point deserves to be reconsidered. The object of the act seems to be, to prevent persons from coming into parishes to settle, who are not of ability to pay 10*l.* a-year for a house, and to secure the actual payment of that sum; but it hardly could have been intended that an occupier to the amount of 500*l.* a-year, having satisfied all the other requisites of the law, but, being suddenly impoverished, and compelled to leave 20*s.* of his rent unpaid, should therefore be deprived of a settlement: and yet, to that absurdity, the decision in *Rex* v. *Ramsgate* must lead. Besides, that construction of the act entirely overlooks the important words to be found in it, namely, that the rent, *to the amount of* 10*l.*, shall be paid for a year.

(*a*) 6 B. & C. 712.

Those are new words, introduced for the first time in the present statute, and must be taken to have some meaning; but either they must be rejected altogether as surplusage, or they must be construed to mean that a part payment, to the amount of 10*l.*, of the annual rent, shall be sufficient. It has been decided, that the omission in the present act of the requisition in the former, that the rent shall be paid *by the person hiring* the tenement, forms a substantial and important distinction between the two, and that under the present act the whole rent need not be paid by the person renting the tenement; *Rex* v. *Kibworth Harcourt* (*a*); and, upon the same principle, and, indeed, *à fortiori*, the introduction of new words in the present act ought to be regarded as being done with some intention, and the only reasonable intention seems to be, to limit the payment to 10*l.*, where the yearly rent exceeds that sum.

Clinton, contrà, was stopped by the Court.

Lord TENTERDEN, C. J.—I entertain no doubt in this case; the more particularly as there has already been one express decision upon the point which it raises. In order to arrive at the true construction of this act of parliament, which it is contended was not done in the case of *Rex* v. *Ramsgate*, it is necessary to consider the state of the law when this act was framed, and the object which the legislature had in framing it. By the statute 59 *Geo.* 3, c. 50, it is quite clear that no person could acquire a settlement by renting a tenement, unless the whole rent for one year was actually paid; and, therefore, the only question is, whether any alteration in that respect was intended to be, or has been effected, by the 6 *Geo.* 4, c. 57. The recital states, that inconveniences had been found to exist in consequence of the settlement of the poor being made to depend upon *the annual value* of tenements which they have rented, or upon *the annual value* of tenements in virtue of which they

(*a*) Ante, vol. i.

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have paid parochial rates. The recital, therefore, clearly applies to "the annual value" only; and the enacting clause, after repealing the former act, and then repeating its words, except so far as it mentions the payment of parochial rates, concludes by declaring, that no person shall acquire a settlement by reason of renting a tenement, unless the rent for the same, to the amount of 10*l.*, be actually paid, for the term of one whole year at the least. The true construction of these latter words, in my opinion, is, that a year's rent, which shall not be less than 10*l.*, but without reference to its being more than 10*l.*, must be paid, in order to entitle the party to a settlement. It is true the words "to the amount of 10*l.*" were not inserted in the former act; it is unfortunate that they have crept into the present act, and they have probably done so through mistake or inadvertence: but they do not appear to me to alter the spirit and meaning of the enactment. I think the passage may be read as if those words were not in it; that they may, in fact, be rejected as surplusage. This being so, the present case is governed directly by that of *Rex* v. *Ramsgate;* no settlement has been acquired in Ashby-de-la-Hay, and the order of sessions, quashing the order of removal from that township, must be quashed.

The other Judges concurred.

Order of Sessions quashed.

The KING *v.* The Inhabitants of WARDEN.

An apprentice, working with his master during the week in one parish, and sleeping on Saturday and Sunday nights at his master's house in another, may gain a settlement in the latter parish by inhabitancy under his indenture. A verbal agreement by a master, "upon being paid 3*l.* to set his apprentice at liberty, and to give him up his indenture," does not discharge the indenture, so as to fix the settlement of the apprentice in the parish where he slept last before the making of such agreement.

TWO justices, by their order, removed *Susanna Kirsopp*, wife of *George Kirsopp*, and their six children, from the

parish of Warden, in the county of Northumberland, to the parish of Whickham, in the county of Durham; and the sessions, on appeal, quashed the order, subject to the opinion of this Court upon the following case:—

George Kirsopp, the husband of the pauper *Susannah Kirsopp*, was bound apprentice to his uncle, *George Elliott*, a stone-mason, by indenture dated on or about the 25th December 1803, for the term of seven years from the date thereof, to learn the art of a stone-mason, and *John Kirsopp*, the father of the apprentice, was a party to the indenture. The apprentice, after serving under the indenture in various places, went on May-day, 1809, with his master to reside in the parish of Whickham. The master worked as a journeyman mason, at Ravensworth Castle, in the township of Lamesly, in the parish of Lamesly; and the apprentice worked there with him, sleeping at a lodging in the township of Lamesly, five nights in each week, and Saturday and Sunday nights in his master's house at Whickham, to which he went every Saturday evening, and returned to his work every Monday morning. The apprentice slept above forty nights in Lamesly, and also above forty nights at Whickham, during his service under the indenture, previous to the 25th March, 1810. On the 24th March, 1810, on a Saturday afternoon, as the apprentice and his master were returning from their work at Ravensworth Castle to Whickham, they mutually agreed that the master, upon being paid 3*l.*, should set the apprentice at liberty, and give him up his indenture of apprenticeship. After this agreement the apprentice went home with his master to Whickham, and slept there that night. He had slept the previous night in Lamesly. The next morning, being Sunday, the apprentice went to his father near Hexham, and his father gave him 3*l.* to pay to his master for giving up his indenture of apprenticeship and setting him at liberty. The apprentice returned in the evening of the same day to Whickham, and paid his master the 3*l.* An agreement on unstamped paper was then drawn up in

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writing, and signed by the master, but not by the apprentice or his father; which agreement was as follows:— "This is to certify, that a mutual agreement has taken place between *George Elliott*, master mason, and *George Kirsopp*, apprentice to the said *George Elliott*, as to delivering up to the said apprentice his indenture, this 26th day of March, 1810, his seven years being expired at 25th December 1810; for which time, he, at this period, pays to his said master 3*l.* for the time unexpired in his indenture. *George Elliott.* As witness, *Hall Johnson.*" The indenture of apprenticeship was not then delivered up by the master, it having, from the time it was executed, remained in the possession of a Mr. *Leadbitter*, who prepared it, and was one of the subscribing witnesses. *George Kirsopp* was nearly, but not quite, twenty-one years of age. He slept in Whickham that Sunday night, and the following day began to work, entirely on his own account, at Ravensworth Castle, where he continued to work about a month, unconnected with his master, and receiving the whole of his own wages, and during that time he slept at Lamesly, not in the lodging which he had previously occupied with his master, but in a distinct lodging taken by himself. The master also continued to work at Ravensworth during the same month that the apprentice remained working there. *George Kirsopp*, after leaving Ravensworth, went to Newcastle, where he worked on his own account, and soon after he delivered the before-mentioned agreement to his father, who, on giving it to Mr. *Leadbitter*, received the indenture of apprenticeship from that gentleman, and sent it to Newcastle to his son, who had never worked for his master after the payment of the 3*l.*. The agreement remained with Mr. *Leadbitter* until it was produced to the Court in evidence. It was proved to the satisfaction of the Court that the indenture was lost, and that due search had been made for it, so as to let in parol evidence of its contents. The Court of Quarter Sessions quashed the Order, and stated the ground of their judg-

ment to be, that the indenture was not put an end to by the agreement, and that the month's service at Ravensworth, after the agreement, was a service under the indenture.

Parke, in support of the order of sessions. The judgment of the sessions cannot be supported on the ground on which they have stated it to have proceeded; because there can be no doubt that the indenture of apprenticeship was discharged by the agreement entered into between the apprentice and his master, it being an agreement for a valuable consideration. But still the sessions were right in quashing the order of removal to Whickham; because, first, if the agreement was complete on the Saturday when it was made, Lamesly, the place where the pauper slept on the preceding night, was his last place of settlement, as it was the last parish in which he slept in his character of apprentice: and, secondly, if the agreement was not complete until the Sunday, when the father ratified it and paid the 3*l.* to the master, still the pauper did not, during any part of his apprenticeship, sleep in Whickham in his character of apprentice, or for any purpose connected with his service; and that being the case, no settlement was gained in that parish. *Rex* v. *Ilkestone* (*a*).

Ingham, contrà, was stopped by the Court.

Lord TENTERDEN, C. J.—The case of *Rex* v. *Ilkestone* was very distinguishable from the present. There the apprentice was allowed by his master, as a matter of indulgence, to go to his father's every Saturday, and to sleep there every Saturday and Sunday night; and it was expressly found there that the apprentice, during those periods of absence, did no work for his master. Here the apprentice returns with his master from their work, and goes to his master's house, where he passes the Saturday

(*a*) 6 D. & R. 64; 4 B. & C. 64; 3 D. & R. M. C. 45.

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and Sunday nights, and on the Monday again accompanies his master to work; having been in the interval under the eye and control of his master, and, for ought that appears, performing all his biddings. He, therefore, slept at Whickham in his character of apprentice, and was an inhabitant of that parish under his indentures. The verbal agreement made on the Saturday between the apprentice and his master certainly could not operate as a discharge of the indentures, so as to transfer the settlement to Lamesly; therefore the settlement was rightly decided in the first instance by the justices who ordered the pauper to be removed to Whickham, and the order of the court of quarter sessions, quashing their order, must itself be quashed.

The other Judges concurred.

Order of Sessions quashed.

The KING *v.* The Inhabitants of KEGWORTH.

A party by whom a tenement is hired and occupied, and the rent paid, for a year, gains a settlement under 59 *Geo.* 3, c. 50, although a third person be surety to the landlord for payment of the rent.

TWO Justices, by their order, dated 20th January, 1827, removed *John Jelly*, *Sarah* his wife, and their six children, from the parish of Sutton Bonington, in the county of Nottingham, to the parish of Kegworth, in the county of Leicester. On appeal, the sessions quashed the order so far as it related to *Sarah Jelly*, one of the children, and confirmed it as to all the other paupers, subject to the opinion of this Court upon the following case:—

In December, 1823, the pauper *John Jelly* applied personally, and also by the agency of one *John Smith*, to one *William Jacques*, to become tenant of a house and six acres of land, both situate in the appellant parish, and finally *Jelly* himself concluded the agreement for and hired the house and land of *Jacques*, at the rent of £26 a year, for one year. He duly entered upon the premises, and

held and occupied the house and land, and paid rent for the same for one year and upwards. He also purchased of and paid for the fixtures on the premises to *Jacques*, and paid the parish rates and taxes; and, upon quitting the premises, *Jacques* paid *Jelly* for the fixtures then upon the premises. *Smith* agreed with *Jacques* to be surety for the rent, but *Jelly* always paid it, and with his own money. The settlements of the wife and the five children are derivative from *John Jelly*.

Clinton, in support of the order of sessions.—The question before the Court is, whether the sessions did right in confirming the order of removal as to the pauper, and his wife and five children; in other words, whether the pauper acquired a settlement in the appellant parish by renting a tenement there. It is submitted that he clearly did. All the requisites of the 59 *Geo.* 3, c. 50, which was the tenement act in force at the time of the transaction, were strictly complied with; and the only question, even at the sessions, was one of fact, namely, to whom the landlord of the house gave credit for the rent; whether to *Smith* or to the pauper. That question the sessions have decided; and that being a question of fact, this Court will not interfere.

N. R. Clarke, contrà.—The statute requires that the tenement shall be *bonâ fide* hired by the person inhabiting it, and claiming a settlement in consequence. Now it is impossible to say that the house and land in this case were *bonâ fide* hired by the pauper, for he negotiated for it in the first instance through the agency of *Smith*, and at the termination of the negotiation *Smith* became his surety for the payment of the rent. *Bonâ fide*, therefore, that is, in the fair and honest interpretation of the transaction, the house was hired by *Smith*, and not by the pauper; and if so, one of the requisites of the statute has not been complied with, and no settlement has been gained.

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Lord TENTERDEN, C. J.—I think there was a perfectly sufficient *bonâ fide* hiring of the premises in question by the pauper, within the meaning of the act of parliament. The case expressly finds that "finally *Jelly* himself concluded the agreement for, and *hired*, the house." What had previously passed between *Smith* and *Jacques*, therefore, became quite immaterial. As to *Smith*'s becoming the pauper's surety for the payment of the rent, that cannot affect the case; for it does not appear that the pauper even knew of that arrangement between *Smith* and *Jacques*, and it is stated that the pauper paid the rent with his own money.

The other Judges concurred.

Order of Sessions confirmed.

The KING *v.* The Inhabitants of COMBE.

Pauper was "hired" by his uncle, a carpenter, "to learn his trade," and "was to do any other work as well as that of a carpenter." His uncle was to find him part of his food and clothing, but he was to lodge with his father. Pauper served his uncle on these terms five years. At the end of two years it was proposed to draw up indentures, to exempt pauper from the militia; but none ever were drawn up:—Held, that this was not a contract of hiring and service, but an imperfect contract of apprenticeship, and that service under it conferred no settlement.

TWO justices, by their order dated 3d February, 1827, removed *Joseph Davies* the younger, *Mary* his wife, and their four children, from the township of Presteign, in the county of Radnor, to the township of Combe, in the county of Hereford; and the Sessions, on appeal, confirmed the order, subject to the opinion of this Court upon the following case:—

The pauper, *Joseph Davies*, had a derivative settlement from his father, in the township of Combe. *Joseph Davies* the elder, the pauper's father, sixteen years ago, when the pauper was about fourteen years of age, was about to put him out to service, and took him to the town of Presteign, with the intention of hiring him, but did not hire him. Shortly afterwards, one *John Cole*, a carpenter, residing in

the township of Presteign, and the brother of the pauper's mother, suggested that it was better for the pauper to go and learn his, *Cole*'s, trade of a carpenter, instead of going to service. At length *Cole* hired the pauper, from his mother, to learn his trade. The pauper was to do any other work, as well as that of a carpenter. *Cole* was to find the pauper part of his food and part of his clothing, but he was to be lodged at his father's house. In pursuance of this contract, the pauper went to *Cole*, and served him for five years, lodging in the township of Presteign with his parents, who provided part of his clothing and victuals. During the whole five years, the pauper did any work *Cole* put him to do, as well as working at the trade of a carpenter. In the second or third year after the pauper had entered upon his service, a conversation took place between the parties about indentures being drawn to bind the pauper to *Cole*, until the age of twenty-one, in order to exempt the pauper from the militia. The indenture was to be drawn to bind the pauper till he was twenty-one, but it was understood that he was to be free at the end of five years, to be computed from the time of the original contract. No indenture was drawn, nor anything afterwards said upon the subject. At the expiration of the five years, (that being understood by the parties to be the termination of the original contract, whatever was the nature of it,) the pauper agreed to work with his uncle, *Cole*, as a journeyman carpenter, under a weekly hiring, and to be paid weekly wages, the pauper boarding and clothing himself; and he was to be at liberty to go away at the end of any week. He continued with *Cole* under those terms, except upon one or two occasions varying the amount of the weekly wages, for nine or ten years.

Campbell, in support of the order of sessions. The sessions, by confirming the order of removal from Presteign to Combe, have virtually found that there was no hiring and service of the pauper, as a servant, in Presteign. In

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so finding they were right; at least they were not palpably wrong; and then, the question being one of fact, this Court will not interfere with their decision. The general rule of legal construction upon this subject is, that where the main object of the contract is to teach and to learn a trade, it is not a contract of hiring and service, but an imperfect contract of apprenticeship; but that where the main object is to have a servant, there is a contract of hiring and service, although part of the compensation for the service may be the teaching a trade; for there the relation of master and servant is created, which in the other case it is not. Then what was the main object of the contracting parties in this case? Clearly to teach and to learn a trade. *Rex* v. *Hitcham* (*a*) seems opposed to this argument. There the pauper agreed to let himself to his brother, a carpenter, for a year. He was to receive no money by way of wages, but his brother was to teach him as much of the trade as he could in the time, and provide him with meat, drink, washing, and lodging; the pauper to do all his brother's lawful business in his farming way. This was held a contract of hiring and service for a year. But there the essence of the agreement was that there should be a service, and a service for a year, which varies that case materially from the present. *Rex* v. *Little Bolton* (*b*), and *Rex* v. *Burbach* (*c*), will also probably be relied on by the other side; but in both those cases the main object was to have a servant, and nothing was said about the pauper's being an apprentice; which Lord *Mansfield*, in the former, and Lord *Ellenborough*, in the latter case, took notice of as a material circumstance. But the decisive case upon this subject, and the one directly in point with and governing the present, is that of *Rex* v. *St. Margaret's, King's Lynn* (*d*). There a shoemaker proposed to the mother of the pauper, a boy, to take him to learn his business. He was to serve

(*a*) Burr. S. C. 489.
(*b*) Cald. 367.
(*c*) 1 M. & S. 370.
(*d*) 9 D. & R. 160; 6 B. & C. 97; 4 D. & R. M. C. 260.

four years, was to board and lodge with his master, and was to have half what he earned. He served four years on those terms. No indentures were executed, *on account of the poverty of the mother*, and no premium was paid. It was held that this was not a contract of hiring and service, but a defective contract of apprenticeship, and that the pauper gained no settlement by service under it. That was precisely the present case. All the cases upon the subject were there cited and considered; and unless the decision there is overruled, it must be held that there is no contract of hiring and service in this case, but only an imperfect contract of apprenticeship, which could not confer a settlement.

W. E. Taunton, contrà. The question, undoubtedly, depends upon what was the intention of the parties. Now their intention must be collected from the terms of the contract, interpreted in great measure by the mode in which the parties conducted themselves in the execution of it. Looking at this case in that point of view, it is clear that the object of these parties was a service; that they intended to constitute the relation of master and servant. The language of the case is important. It says, "*At length Cole hired* the pauper;" it first indeed states, "to learn his trade;" but it adds, "the pauper was to do any other work." If it had said, "*Cole hired* the pauper to learn his trade, *and* to do any other work," there would have been a clear and complete contract of hiring and service; for it does not appear that at the time of the contract one word was said about an apprenticeship. Afterwards, indeed, it was proposed to draw up indentures, but not as the ratification or explanation of the contract existing between the parties, but merely as an expedient to exempt the pauper from the militia; and at that time the pauper had served two years, and if the original contract was a valid hiring, had already gained a settlement by service under it. The cases cited on the other side, and endeavoured to be distinguished

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from the present, are unimpeached and decisive authorities to shew that there is a good contract of hiring and service here: and with respect to the case of *Rex* v. *King's Lynn*, it is perfectly distinguishable from the present, because there the main object clearly was, not a service, but an apprenticeship, for the original proposition was "to take the boy to learn the master's business; but there were no indentures, on account of the mother's poverty."

Cur. adv. vult.

Judgment was now delivered by

Lord TENTERDEN, C. J.—The question in this case was, whether the pauper served his uncle, in the township of Presteign, in the character of a servant or of an apprentice. The cases upon this subject have repeatedly decided that an imperfect contract of apprenticeship cannot be converted into a contract of hiring and service, so as to render service under the one equivalent to service under the other, and sufficient to confer a settlement. They have further decided that in determining what is the true nature of the contract, the intention of the parties is principally to be regarded. In the present case it appeared that the pauper was hired by his uncle to learn his trade, and that he was to do any other work, as well as that of a carpenter, of which trade his uncle was. After serving his uncle upon those terms for two or three years, a conversation took place about indentures, which it was proposed should be drawn up, for the purpose of exempting the pauper from serving in the militia; but no indentures were ever in fact executed. The last case upon this subject which came before the Court, was that of *Rex* v. *King's Lynn*, the facts of which very closely resembled those of the present, and where it was decided, upon grounds so clearly stated by my brother *Holroyd*, that the relation of master and apprentice, and not that of master and servant, was contemplated by the parties. We are of opinion that all the cir-

cumstances of this case also lead fairly to the conclusion that the parties intended to constitute the relation of master and apprentice. The parents at first proposed to send the pauper out *to service;* but the uncle suggested that it would be better that he should go and *learn his trade.* The object, therefore, clearly, from that moment was to put the pauper with his uncle as a pupil and apprentice, and not as a servant; and his service with his uncle was certainly not under anything like an express contract of hiring, but under an imperfect contract of apprenticeship. We are, therefore, of opinion that the pauper acquired no settlement in Presteign, and that the order of sessions, removing him to Combe, ought to be confirmed.

Order of Sessions confirmed.

The KING *v.* EVERETT.

Information, stating that *H.* was a person *employed* in the service of the customs, that it was his *duty*, as such person so employed, to seize certain goods, and that defendant offered to bribe *H.* to violate such duty:—Held, bad in arrest of judgment, for not stating the facts out of which the legal duty arose.

THIS was an information, filed by the Attorney-General, against the defendant, under the statutes 6 *Geo.* 4, c. 106, and 6 *Geo.* 4, c. 108, for offering a bribe to an officer of the customs.

The first count stated that on, &c. at, &c. certain goods, to wit, certain spirituous liquors were about to be imported and brought into Great Britain, in respect of which certain duties would become payable to the king; that at the time of the committing the several offences after mentioned, *Richard Hooper* was *a person employed* in the service of the customs; that at the time of the committing the offences in the first and second counts mentioned, it was the duty of the said *Richard Hooper, as such person so employed as aforesaid,* among other things, to give notice to some officer or officers employed in the service of the customs of all such goods as should be attempted to be imported, in respect whereof the duties of customs by law payable to

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the king should not be duly and truly satisfied and paid, or otherwise agreed for according to the statute, to the end that such goods might, by such officer or officers employed in the service of the customs, be seized and secured, in order that the same might be dealt with according to law. The count proceeded to allege that it came to the knowledge of *Hooper*, being *such person so employed* as aforesaid, that the goods before mentioned were about to be imported; and that the defendant, contriving to cheat and defraud the king in his revenue of the customs, on, &c. at, &c. did unlawfully and corruptly solicit, move, &c. *Hooper*, being then and there *such person so employed* as aforesaid, unlawfully and corruptly, and contrary to his *duty in such employment* as aforesaid, to forbear to give notice to any officer or officers employed in the service of the customs. The count then proceeded in the usual form to allege the offering of a bribe by the defendant to the person so in the employment of the customs.

The second count was similar to the first, only stating the bribe to be offered for permission to run the goods on shore.

The third and material count stated, that on, &c. at, &c. it was the *duty* of the said *Richard Hooper, as such person so employed* in the service of the customs of our lord the king as aforesaid, to arrest and detain all such goods and merchandizes as should, within his knowledge, be imported and brought into Great Britain, *which* upon such importation thereof would become forfeited to our said lord the king, by virtue of any acts of parliament relative to his majesty's customs then in force, and *which* would then and there be liable to be seized as forfeited as aforesaid, in order that such goods and merchandizes might be dealt with according to law; and that the defendant well knowing the premises, but having no regard for the laws and statutes of this realm, and unlawfully devising, &c. to cheat and defraud our said lord the king in his said *revenue of the customs*, on, &c. at, &c. did unlawfully

and corruptly solicit, move, &c. the said *Richard Hooper*, being then and there *such person so employed* in the service of the customs of our said lord the king as aforesaid, when certain goods and merchandizes should be imported and brought into this kingdom, *which*, upon such importation thereof as aforesaid, would become forfeited to our said lord the king, by virtue of certain acts of parliament relative to his majesty's customs then in force, and *which* would then and there be liable to be seized as forfeited as aforesaid, unlawfully, unjustly, and contrary to the *duty* of him the said *Richard Hooper, as such person so employed* in the service of the customs of our said lord the king as aforesaid, to forbear to arrest and detain the said last mentioned goods and merchandizes, in order that the same might not be dealt with according to law; whereby our said lord the king might and would be then and there defrauded in his said revenue of the customs.

The fourth count alleged the offering a bribe to *Hooper* to connive at the running on shore of certain goods liable to duty on importation.

The defendant was convicted on the third count only, and being now brought up for judgment,

F. Kelly moved to arrest the judgment. The third count of this information, the only one upon which the defendant has been found guilty, cannot be supported. The only clauses of the Customs' Acts upon which it can be attempted to support it, are, the 6 *Geo.* 4, c. 106, s. 8, and the 6 *Geo.* 4, c. 108, s. 34. The former enacts that "every person employed on any service relating to the customs, by the orders or with the concurrence of the commissioners of customs (whether previously or subsequently expressed), shall be deemed to be the officer of the customs for that duty or service;" and the latter, that "all vessels and boats, and all goods whatsoever, liable to forfeiture by the customs' laws, shall and may be seized in any place, either upon land or water, by any officer or officers of the army,

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navy, or marines, duly authorized, and on full pay, or officers of customs or excise, or any person having authority to seize from the commissioners of customs or excise; and all vessels, boats and goods so seized shall, as soon as conveniently may be, be delivered into the care of the proper officer, appointed to receive the same." Now, in the first place, this count does not describe *Hooper* in terms which bring him within any one of the classes of persons enumerated in those clauses. It describes him merely as a person employed in the service of the customs, and avers that he being so employed, it was his duty to seize certain goods. It does not describe him as "an officer of the army, navy, or marines, duly authorized, and on full pay;" or as "an officer of the customs or excise;" or as "a person having authority to seize from the commissioners of customs or excise;" it merely states that he was employed in the service of the customs, and from thence assumes that it was his duty to seize. Now the mere fact of employment in the service of the customs could not confer on *Hooper* any authority to seize goods, much less could it make it his duty to do so; and yet the offer to bribe him to violate or neglect his duty is the very gist of the offence charged against the defendant. Secondly, this count alleges the offer to bribe to have been made in respect of goods which were liable to forfeiture upon their mere importation, without reference to any custom or duty payable upon them; and then avers that such offer was made with intent to defraud the king in his revenue of customs. This is clearly a misdescription of the offence intended to be charged. If there was no custom or duty payable on the goods, there was no revenue derivable to the customs in respect of them, and the importation of them could not work any fraud on the revenue of the customs. The goods, when imported, might become liable to forfeiture on other grounds, and the offer to bribe the officer might on other grounds be a great offence, and highly punishable; but it was clearly no fraud upon the customs; for even the increase to

the revenue consequent on the seizure of the goods would not be an increase to the revenue of customs, any more than the increase to the revenue produced by fines inflicted on delinquents would be. Thirdly, this count does not allege that any goods liable to forfeiture were intended, or expected, to be imported, or even that there were any such goods in existence; it merely states that the defendant bribed *Hooper, when* certain goods *should* be imported, *which* upon importation *would become* forfeited, and liable to be seized, to forbear to seize them. Now that really amounts to no more than a charge of offering a bribe to a person to do something, *if* ever that something should become requisite to be done, which is far too vague and uncertain. The count does not shew any offence to have been in contemplation; and it is surely going much too far to charge as an offence the bribing another to co-operate in an act which does not appear to have been intended: it would be hardly going further to charge one person with soliciting another to murder a third person, who was not yet in existence. Upon all, or any of these grounds, it is submitted that this count is bad, and therefore that the judgment ought to be arrested.

The *Attorney-General*, the *Solicitor-General*, *Storks*, Serjt. and *Shepherd*, contrà. The first objection to this count seems to be, that it does not sufficiently allege that *Hooper* was an officer or person *authorized* to seize goods liable to forfeiture. There is no weight in that objection. It is expressly alleged that it was the *duty* of *Hooper* to seize such goods; it could not by possibility be his duty to do so, unless he had authority for doing so: and, after verdict, it must be presumed that the jury have found affirmatively the fact that such was his duty, and that he had such authority. It would clearly be a sufficient allegation if the offence were laid at common law; and when the words of the 6 *Geo.* 4, c. 108, s. 34, are duly considered, it will appear to be sufficient within that statute. The statute directs the seizure

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of goods by any person having authority from the commissioners; and as it is here stated that it was *Hooper's duty* to seize, it follows that he had *authority* to seize, because the averment of the duty necessarily and unavoidably includes the averment of the authority. But another class of persons authorized by that clause to seize, are, officers of the customs or excise. Now by a former act of parliament, 6 *Geo.* 4, c. 106, s. 8, every person employed on any duty or service relating to the customs, by the commissioners, is to be deemed the officer of the customs for that duty or service; consequently, *Hooper* must be taken to be an officer of the customs for the purposes mentioned in the information. [Lord *Tenterden*, C. J. That argument might be good if the information alleged that *Hooper* was employed in the service of the customs *to seize* forfeited goods; but it stops short of that: it alleges only that he was employed.] The second objection is, that the goods are described as prohibited goods, and therefore that there could be no duty payable on their importation, and no fraud intended upon the revenue of the customs. But there is nothing in that objection. If the intent were omitted altogether, the remaining fact charged would constitute an offence of itself. Besides, the argument advanced in support of this objection assumes the very fact upon which it rests, for it does not appear from the language of the information that the importation of the goods was prohibited; they are described as liable to forfeiture and seizure upon importation: but that by no means necessarily implies that they were prohibited from importation. Goods that are forfeitable can scarcely be considered as prohibited; and goods allowed to be imported may become forfeited, by being imported in an irregular or illegal manner. Again, goods which are forfeited in themselves, may, in some instances, at the discretion of the commissioners, be allowed to be imported upon payment of certain duties. The 7 *Geo.* 4, c. 107, s. 33, contains a provision of this nature with reference to surplus stores; and it is sufficient

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for the present argument to point out any one instance in which goods liable to forfeiture upon importation may be allowed to be imported upon payment of a duty: besides, forfeited goods are saleable, and their proceeds go towards the revenue. The third objection is, that the information does not allege that any goods liable to forfeiture were intended or expected to be landed, or were even in existence. To allow such an objection would be to hold out a premium for the commission of the very offence which it was the object of the legislature to put down. The parties would only have to bargain for *time*, instead of bargaining for any particular goods, and thus the law might be broken and the revenue defrauded with impunity.

Lord TENTERDEN, C. J.—I am of opinion that the first objection taken to this information must prevail; and I therefore consider it unnecessary to discuss the other two. The count in question states that *Hooper* was a person employed in the service of the customs, and that it was his duty, as such person so employed, to seize. The fact alleged, therefore, is, that he was a person employed in the service of the customs; and the inference intended to be drawn from that fact is, that because he was a person so employed, it was his duty to seize. This, therefore, is an allegation of matter of law, and being so, the fact shewing the legal duty should have been stated. Is that fact so stated here? Can it be said that it is the duty of every person employed in the service of the customs to seize goods? We cannot say so. The governing principle upon this point was very clearly laid down in the case of *Max* v. *Roberts* (*a*), which came before this Court upon a writ of error from the Court of Common Pleas. There a fact was stated in the declaration, from which it was attempted, in point of law, to infer a duty; but there was there, in the words of Lord *Ellenborough*, as it seems to me there is here also, "an entire absence of all circum-

(*a*) 12 East, 89.

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stances or facts from which any duty could be inferred." The question there also arose, as it does here, after verdict; and, in addition to all, the present is a criminal proceeding. The difficulty arising upon the 6 *Geo.* 4, c. 108, s. 34, is not removed by reference to the other statute of 6 *Geo.* 4, c. 106, s. 8. It has been contended in argument that it is, because *Hooper* must be deemed to have been acting as an officer of the customs within the operation of that clause, and as such to have been a person authorized to seize. But, unfortunately for that argument, it overlooks this very important fact, namely, that that clause relates only to employment in a particular service. If the information had stated, not only that *Hooper* was employed in the service of the customs, but that he was so employed *to seize*, there might have been some weight in the argument, but standing as the averment does, there is none. I am, therefore, of opinion that the judgment must be arrested.

BAYLEY, J.—I am of the same opinion. By the 6 *Geo.* 4, c. 108, s. 34, three descriptions of persons are authorized to seize, and the information fails to bring *Hooper* within either of them. It merely states that he was employed in the service of the customs, and that it was his duty to seize. The latter allegation is matter of law; but there are no facts stated to shew that it was his duty to seize: there is a conclusion drawn, but there are no premises from which to draw it.

HOLROYD, J.—I think this case falls precisely within the principle of the case of *Max* v. *Roberts*.

LITTLEDALE, J. concurred.

Rule absolute to arrest the judgment.

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Where it appeared that an indenture of apprenticeship, 24 years old, the expenses of which the overseers of a parish had paid, was sent to those overseers, and was not to be found in the parish chest: Held, that it might be presumed to be lost, and that secondary evidence of its contents was admissible.

BY an order of two justices, dated 27th April, 1827, *George Layton*, his wife and their four children, were removed from the parish of Bromsgrove to the township of Stourbridge, both in the county of Worcester; and the sessions, on appeal, confirmed the order, subject to the opinion of this Court upon the following case:—

The respondent parish established a derivative settlement of the pauper in the appellant township, by relief given to his mother. The mother, being examined on the part of the appellants, stated, that about twenty-four years ago she received some money from the overseers of Stourbridge to put her son out apprentice, and that she accordingly put the pauper, at the age of about seven years, apprentice to one *William Clay*, of the parish of Bromsgrove, who was her brother-in-law; that the indenture was signed by her, by the pauper, and by the master, who had it filled up; that she gave the indenture to one *Nanny Badger*, to take to Stourbridge to the overseers who had given her the money to pay for the stamp for it; that it was directed to the overseers of Stourbridge; that *Nanny Badger*'s husband was a market gardener, and used to attend Stourbridge market; that sometimes he, and sometimes his wife, went to the market; and the indenture was to be carried to the overseers either by the husband or the wife, when they went to the market; that both *Nanny Badger* and her husband were since dead, but that she had survived her husband; that she did not know whether *Nanny Badger* had left any will, but she had heard that she had. The appellants further proved by *John Mosely*, an overseer of Stourbridge, that he had searched diligently in the chest where the papers of the township are kept, for the indenture of apprenticeship, but had not been able to find it; and that he had applied to the executor of *William Badger*, the husband of the said *Nanny Badger*, who had informed him that the indenture

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had never come to his hands, and that he was certain that no such paper was in *William Badger's* possession when he died. Under these circumstances the appellants proposed to give secondary evidence of the due execution and contents of the indenture; but the evidence was objected to on the part of the respondents, and disallowed by the Court of Quarter Sessions, on the ground that sufficient evidence had not been given of the loss of the indenture. The question for the opinion of the Court was, whether, under the circumstances above stated, secondary evidence ought to have been admitted of the execution and contents of the indenture.

Shutt, in support of the Order of Sessions.—The appellants had not given such satisfactory evidence of the loss of the indenture of apprenticeship, as entitled them to give secondary evidence of its execution and contents. This was not the case of a document which was *functus officio*, which had lost all its value, and become utterly useless; on the contrary, the indenture was an instrument which it might be not only important but necessary for the parish officers of Stourbridge to be able to produce. Where a document is of such a nature, the strictest and clearest proof of search and of loss is required, before secondary evidence can be received. The distinction in this respect, between documents which it is of importance to the interest of the party to preserve, and those which having become useless may be presumed to have been lost, is well pointed out by the Lord Chief Justice of this Court, in the case of *Brewster* v. *Sewell* (*a*). Speaking of the instrument there in question, which was a policy of insurance, his lordship says, "there was no reason to suppose that the policy could at any future time be called for, to answer any reasonable purpose whatever. In that respect such a document differs from an

(*a*) 3 B. & A. 296. See also the judgments of *Bayley*, J. and *Best*, J., upon the same point, in *Freeman* v. *Arkell*, 3 D. & R. 674, 675. And see 1 M. & R. 297, n.

indenture of apprenticeship. The latter instrument may be useful after the apprenticeship has expired, to entitle the party to the freedom of a corporation, or to exercise a trade; or it may be evidence of his settlement: any of these reasons may induce a person to take care of such an instrument." Those observations apply pointedly to the present case. The parish at large, and the overseers for the year in which the binding took place, had a strong and decided interest in preserving the indenture. It was the duty of the appellants, therefore, to have found the parish officers of that year, or at least to have proved that they had made due inquiries, of the pauper's mother for instance, who they were, and that they had endeavoured to find them if alive, or their executors in case of their death. The indenture was directed to the overseers, and was put into a reasonable course of delivery to them. For all that appears, one or both of those overseers may be now living, and one of them may have the indenture in his possession; nay, more, the appellants may know those facts, but may also know that there is some defect or irregularity in the indenture, on account of which they may think it prudent not to produce it, and prefer giving parol evidence of its contents. This is not like cases where the parish officers do not know of the binding, and therefore feel no interest about the indenture; here the binding took place at the suggestion of the overseers, and they had a decided object and interest in view, namely, to throw the burthen of the pauper's maintenance upon the parish of Bromsgrove, to promote which they would naturally preserve the indenture. [*Bayley*, J. If that was their object in promoting the binding, and they supplied the necessary money out of the parish funds, they would certainly be interested in preserving the indenture; and in that case they would know that the parish chest was the safest and most proper depository for it, and would probably deposit it there. But search has been made for it there, without success.] Not being found there upon that search, the inference was that it had never been depo-

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sited there, but that it remained in the possession of one of the overseers to whom it was directed, and doubtless delivered, or his representative. It was his interest to preserve it, and, therefore, it was the duty of the appellants to prove that he had not done so.

M'Mahon, contrà.—This objection, relative to the non-production of the overseers, is started now for the first time; it was not suggested at all at the sessions; the only point there made was, that the executors of *Nanny Badger* ought to have been produced, to shew that the indenture was not in their possession. Neither objection, however, can prevail. The indenture was not directed or sent to *A.* or to *B.*, to any particular overseer, but generally to *the overseers*. Supposing it to have reached them, they had but one duty to perform, namely, to deposit it in the parish chest, the only safe and natural place of deposit for such things. The contrary not being shewn, the Court will, as a matter of course, presume that the overseers regularly performed their duty in that respect. There was no interest in the overseers of any particular year to preserve this indenture, and therefore no reason why the overseers for the year in which the binding took place should have been resorted to upon the subject. (Here the Court stopped him.)

Lord TENTERDEN, C. J.—The question is, whether there was such reasonable evidence of the indenture having been lost, as entitled the appellants to give parol evidence of its contents. Considering the nature of the instrument, and the circumstances of the case, I am of opinion that there was. It seems to me, that if care had been taken to preserve the indenture, it would have been deposited in the parish chest, and there found; and that, not being found there, the fair presumption is that it was lost. If we were to hold otherwise, and were to require the sort of proof which it has been contended ought to have been adduced, it would be necessary, in such a case, to produce

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not only the parish officers themselves for the year in which the binding took place, if living, or their representatives if dead, but the parish officers, or their representatives, for every year, no matter how many, between the date of the indenture and that of the inquiry. Such evidence would be endless and impracticable; and it would be unjust and absurd to require it. Upon this short ground, I am of opinion that the order of sessions is wrong.

BAYLEY, J.—I am entirely of the same opinion. The parish chest was the natural and probable place for this indenture to be found in. Search has been made for it there, and it cannot be found. The only reasonable inference is, that it is lost. Then parol evidence of its contents ought to be received. The case must be reheard.

The other Judges concurred.

Order of Sessions quashed.

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CASE by the plaintiffs against the defendants for negligently carrying goods on board their ship, *per quod* the goods were damaged. Plea, not guilty. At the trial before the Lord Chief Justice, at the London adjourned sittings after Michaelmas term, 1826 (*a*), a special verdict was found, stating substantially as follows:—

The owners of a ship, by deed, *called* a charter-party, appointed *A.* to the command of the ship, on a voyage from London to Calcutta and back. *A.* was to load the ship out and home, and to secure to the owners a certain amount of freight, retaining the surplus, or making good the deficiency. An agent of the owners was to go on board, to superintend the management of the stores, with power to displace *A.*, and appoint another commander, in case of his breaking the agreement on his part:—Held, that the deed was not, in point of law, a charter-party, so as to release the owners from their liability, as such, to make good the loss upon goods sent from Calcutta to London by the ship, and lost or damaged on the voyage.

On the 11th March, 1817, the plaintiffs and *A. Colvin* the elder, deceased, shipped on board the ship *Benson*, near Calcutta, in the East Indies, then riding at anchor in

(*a*) As to the previous proceedings, *vide post*, 67, n.

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the river Hooghly, 2171 bags of sugar, and 191 chests of indigo, then being in good order and well conditioned, for which the following bill of lading was signed by *G. Betham*, then being the master of the ship, under the circumstances hereinafter mentioned:

"Shipped by the grace of God, in good order and well conditioned, by Messrs. *Colvins, Bazett*, & Co. in and upon the good ship called the Benson, whereof is master under God for this present voyage *G. Betham*, and now riding at anchor in the river Hooghly, and by God's grace bound for London; to say, 2171 bags of sugar, and 191 chests of indigo, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned, at the aforesaid port of London, (the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted) unto Messrs. *Bazett, Farquhar*, and Co. or to their assigns, freight for the said goods being paid by bills. In witness whereof the master or purser of the said ship hath affirmed to four bills of lading, all of this tenor and date, the one of which four bills being accomplished, the other three to stand void."

Sugar.	
K	335
KK	148
B	361
B	680
KB	647
	2171 bags.

Indigo.		
R. B. jun.		
No. 1, a.	113	113
B		
No. 1, a.	78	78
	191 chests.	

Betham received the goods on board the ship, in the river Hooghly, to be carried and conveyed according to

the bill of lading. At the time of the goods being so shipped and received, and the bill of lading signed, and before that time, the defendants and *James Capper*, deceased, were the owners of the ship; and before the ship sailed to the East Indies, and while they were such owners, the following charter-party, bearing date the 7th June, 1816, was executed by the defendant *T. S. Benson*, who was then the managing owner of the ship, and acting on behalf of himself and the other part owners of the ship, on the one part, and by *Betham* of the other part, for the ship :—

" This charter-party of affreightment, made and concluded in London the 7th day of June, 1816, between *T. S. Benson*, esq. of London, part owner of the good ship called the Benson, of 573 tons measurement or thereabouts, now lying in the port of London, of the one part; and *G. Betham*, of London, merchant and mariner, freighter of the said ship, of the other part; witnesseth, that the said owner, for the considerations hereinafter mentioned, doth hereby promise and agree to and with the said *G. Betham*, his executors, &c. that the said *G. Betham* shall have, and he is hereby accordingly appointed to the command of the said ship, but with such restrictions as hereinafter mentioned, and subject to the proviso or condition hereinafter contained respecting the appointment of an agent on board the said ship, on the part of the said owner. And the said ship being tight, staunch, and substantial, and every way properly fitted, victualled, and provided, as is usual for vessels in merchants' service, and for the voyage and service hereinafter mentioned, and being also manned with 35 men and boys, (the said commander included) he the said *G. Betham* shall be at liberty, and he is hereby allowed and permitted to receive, take, and load, on board the said ship, in the port of London, all such lawful goods, wares, or merchandise, as he may think proper to ship, (not exceeding in the whole what the said ship can reasonably stow and carry, over and above her stores, tackle, apparel,

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and provisions,) and reserving sufficient room in the said ship for 100 tons of goods to be laden by or for account of the said owner, as hereinafter is mentioned; and the said ship being so laden, he the said *G. Betham* shall and will set sail therewith, and proceed to Calcutta, in the East Indies, (with liberty to touch at Madeira and Madras in her outward passage;) and being arrived at Calcutta aforesaid, shall and will unload the said outward cargo, and reload the said ship with a cargo of East India produce, and return with the same to the port of London; and upon her arrival there, and being finally discharged of her cargo, and cleared by the revenue officers, the said intended voyage and service is to end and be completed, (the act of God, the king's enemies, restraint of princes and rulers, fire, and all and every the dangers and accidents of the seas, rivers, and navigation, of what nature or kind soever, excepted.) And the said owner doth hereby further promise and agree to and with the said *G. Betham*, his executors, &c. that in case any of the aforesaid complement of 35 men and boys shall happen to die, or desert or leave the said ship, during her said intended voyage and service, so that the number shall be reduced below 32, then and in every such event happening, the aforesaid number of 32 shall, if practicable, be kept and made up at the expense of the said owner. And further, that the said ship shall at all times, during her said intended voyage and service, be furnished and provided with proper and sufficient stores, provisions, and other necessary articles; and that the said ship shall, if required, be kept and continued in the service aforesaid for and during the term or space of 12 calendar months, to be accounted from the 12th day of the present month of June, and for and during such longer time or term as may be necessary to complete her aforesaid voyage, and until her return to the port of London, being finally discharged of her homeward cargo, and cleared by the revenue officers. And the said owner doth also promise and agree that the said ship shall, previous to her departure

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from the port of London on her above-mentioned voyage, be furnished and provided with good water casks, capable of containing 18 tons of water. And the said owner doth also engage to provide the said ship with coals and wood for cooking and dressing the passengers' provisions, for which the said freighter is to pay or allow unto the said owner, his executors, &c. at and after the rate of fourteen pence for every passenger or servant per lunar month, and so in proportion for a less period. In consideration whereof, and of every thing above-mentioned, the said *G. Betham* doth hereby promise and agree to and with the said *T. S. Benson*, his executors, &c. that he the said *G. Betham* shall and will take upon himself the command of the said ship for and during her said intended voyage, and until her return to the port of London, and shall and will navigate her to the best and utmost of his skill and ability. And also that he the said *G. Betham*, his executors, &c. shall and will accept, receive, and take the said ship into his or their service for and during the term or space of 12 calendar months certain, to commence and be accounted from the 12th day of the present month of June, and for and during such longer time or term (if any) as may be necessary to complete her said intended voyage, and until her return to and final discharge in the port of London aforesaid. And further, that he the said *G. Betham*, his executors, &c. shall and will well and truly pay, or cause to be paid, unto the said owner, his executors, &c. freight for the use or hire of the said ship, at and after the rate of 25*s.* per ton, register measurement of the said ship, per calendar month, for and during the aforesaid term of 12 calendar months certain, and for and during such longer time or term (if any) as may be necessary to complete her said intended voyage, and until her return to the port of London, and being finally discharged of her homeward cargo, and cleared by the revenue officers, or, up to the day of her being lost, captured, or last seen or heard of; such freight to be paid in manner following: that is to say,

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the sum of 1000*l.*, part thereof, at or before the execution of these presents; the sum of 2000*l.*, further part thereof, by approved bill or bills to be drawn in London upon Calcutta, in favour of the said owner, payable, as to one moiety thereof, at one calendar month, and as to the other moiety thereof at two calendar months, next after the ship shall arrive at Calcutta aforesaid; and the residue and remainder of such freight to be paid or secured to the satisfaction of the said owner, his executors, &c. upon the arrival of the said ship in the port of London, and previous to commencing the discharge of her homeward cargo. Provided always, that in case the said ship shall be kept or detained at Calcutta aforesaid more than 90 days, then and in such case the said *G. Betham* doth hereby engage to pay, or cause to be paid, at Calcutta aforesaid, to the agent of the said owner, the sum of 1000*l.*, either in cash, or by bills to be approved of by such agent, in part payment of the balance of freight which may become due under and by virtue of this charter-party; and the further sum of 1000*l.* at the expiration of every 60 days after the said 90 days, which the said ship may expend or lie at Calcutta aforesaid. And it is hereby declared and agreed by and between the said parties, that the bills remitted from India in manner hereinafter expressed shall be deemed, taken, and considered as good and sufficient security for the payment of the residue or balance of freight which may become due under and by virtue of these presents, as hereinbefore mentioned. And the said *G. Betham* doth hereby especially promise and agree that all and every the bills of exchange, which may be taken in payment of the freight of the said ship's homeward cargo, shall be made payable to, or to the order of, Messrs. *Buckles, Bagster*, and *Buchanan*, of the city of London, merchants, or indorsed over to them, and delivered over to the said owner's agent, to be by him remitted to them in London; who, it is hereby especially agreed by and between the said parties, are to receive the amount thereof as joint

trustees for the said owner and the said *G. Betham*, he the said *G. Betham* hereby authorizing and empowering them to appropriate the proceeds of such bills of exchange in and towards payment to the said owner, his executors, &c. of the balance of freight which may be or become due to him or them under and by virtue of these presents, and the residue, if any, to the said *G. Betham*, his executors, &c. And the said *G. Betham* doth hereby further promise and agree to furnish and provide, at his own expense, sufficient provision and water, and also all other necessaries, for the use of the passengers on board the said ship; and that he the said *G. Betham* shall and will pay for all provisions belonging to the owners of the said ship which shall be issued for the use of or consumed by any of the passengers or servants during the said voyage, an account of the same being rendered to him once a week by the said owner's agent, or by the steward on board the said ship: and further, that all expenses of bulk-heads, cabins, and other accommodations for passengers, shall be paid by him the said *G. Betham*, the materials for which are to be left on board the said ship at the termination of the said voyage, and become the property of the said owner, except the hearth, and three foremost water-closets put up by the said freighter, which he is to be at liberty to take away, putting the said ship in the same state she was in before such hearth and water-closets were put up. And the said *G. Betham* doth also agree to pay and defray all port charges and pilotage which may be incurred by the said ship during her said intended service, save and except such as may be incurred in the port of London outward and homeward bound, and once at Calcutta. And the said *G. Betham* doth hereby further agree that the said owner shall have the liberty of shipping on board the said ship outward bound, freight free, any quantity of iron, vinegar, and mustard, he may think fit, not exceeding in the whole 100 tons, to be delivered at Calcutta. Provided always, and it is hereby expressly agreed and understood by and

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between the said parties to these presents, and particularly by the said *G. Betham*, that an agent shall be put on board the said ship by the said owner, for and during the whole of her aforesaid voyage and service, and who is to have a separate cabin in the said ship, at least six feet square, for his sole use, and to mess at the said *G. Betham's* table; which agent is to have the sole management, direction, and superintendence of the said ship's stores and provisions, and the issuing and delivering out of the same for and during the said intended voyage; and such agent is likewise to have the sole ordering and purchasing of any supplies, stores, provisions, and other articles, which may be required for the use of the said ship during her said voyage: and that all bills which may be required to be drawn upon the owners of the said ship, for any such supplies, or otherwise on account of the said ship, shall be drawn by such agent only. And the said *G. Betham* doth hereby expressly engage that he will not, at any time or times during the said voyage, or during the time he may be in command of the said ship, interfere with, or issue, any stores, provisions, or other articles, on board the said ship, or purchase any provisions, stores, or other articles, for the use of the said ship, except only such as may be requisite for the passengers and for the said freighter's servants, and for which he will pay out of his own proper money: and likewise that he the said *G. Betham* shall not nor will, at any time or times, draw any bill or bills upon the owners of the said ship, any or either of them, for any provisions or other articles supplied the said ship, or for any other purpose whatsoever. Provided also, and it is hereby further agreed by and between the said parties, and especially by the said owner, that the said freighter shall have the liberty and privilege of employing the said ship in the East Indies, for any intermediate voyage or voyages he may think fit, without prejudice to this charter-party, but not exceeding in the whole the time or term of 12 calendar months, to be computed from and after the expiration of

30 days next after the arrival of the said ship at Calcutta aforesaid, upon his, the said *G. Betham*, his executors, &c. paying or causing to be paid to the said owner, his executors, &c. the same rate of freight as is hereinbefore stipulated, viz. 25*s.* per ton per month for all such additional time as the said ship may be so employed and detained in India; such additional freight being paid to the said owner's agent for the time being, or secured to his satisfaction, previously to the said ship entering or proceeding on such additional voyage or service. And it is hereby expressly provided and declared, that in case the said *G. Betham* shall proceed with the said ship to any port or place other than Madeira, Madras, and Calcutta aforesaid, without the special leave in writing of the agent of the said owner for the time being; or if the said *G. Betham* shall be guilty of a breach of any or either of the promises and agreements herein contained on his part, then and in every such case the said *G. Betham* shall be and become divested of any further command of or in the said ship, and it shall thereupon be lawful for the said owner's agent for the time being to appoint another commander for the said ship, in lieu and stead of the said *G. Betham*. And it is hereby further expressly provided and declared, that in case the said ship shall be kept or detained at Calcutta beyond the 90 days hereinbefore mentioned; or if, in that event, the said *G. Betham* shall make default in payment of any or either of the sums of 1000*l.* hereinbefore engaged to be paid at that place to the agent of the said owner in part discharge of the balance of the freight to become due under and by virtue of this charter-party; it shall thereupon be lawful for the said owner's agent to load the said ship with a cargo for England on the said owner's account, without prejudice, however, to this charter-party, or to any claim which the said owner, his executors, &c. may have against the said *G. Betham*, his executors, &c. for freight, dead freight, or otherwise on account thereof. And lastly, the said *G. Betham* doth hereby promise and

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engage not to carry too great a press of sail on the said ship during her navigation, so as to endanger her safety, and shall not nor will put into any place or port other than such as are allowed or permitted by this charter-party, unless compelled by stress of weather, want of repairs, provisions, or other unavoidable casualty. Provided always, and it is hereby mutually agreed and understood by and between the said parties to these presents, that if the said ship shall, during her said intended voyage or service, meet with any accident, so as to render it absolutely necessary for the said commander to put into port to repair, and the said ship shall be actually detained more than ten days for that purpose, then and in such case the monthly freight or hire, hereby made payable, shall cease and be discontinued from and after the expiration of such ten days, and not commence again until the day the said ship shall be refitted and ready again to set sail and proceed on her intended voyage, wind and weather permitting. And to the true performance of all and every the promises and agreements herein contained on the part and behalf of the said parties respectively, they bind themselves, their heirs, &c. each unto the other of them, especially the said owner, the said ship or vessel, her freight and appurtenances, and the said freighter, the goods to be laden in her, in the sum of 15,000*l.*," &c.

The said charter-party was made and executed *bonâ fide*. On the 25th July, 1816, the following memorandum was signed and agreed to by the defendant *T. S. Benson* and *G. Betham*:—

"Conditions agreed between *T. S. Benson*, owner, and *G. Betham*, commander of the ship *Benson*, on a voyage to India. Wages 10*l.*, (say ten pounds) per month. No primage or privilege of tonnage whatever. Cabin allowance for voyage (it being understood that the agent, chief and second mates, and surgeon (if any) mess in cabin) 150*l.*, owner providing nothing. Allowance when in India, three sicca rupees per day."

One *Samuel Oviatt* went as agent on board the said ship, under the said charter-party, on the said voyage, and carried out letters of introduction from the said Messrs. *Buckles, Bagster,* and *Buchanan,* on behalf of the defendants to the plaintiffs, by which he was directed to apply to them in case of necessity; and he did apply to them, and they acted as agents at Calcutta, both for the defendants and the said *G. Betham,* as hereinafter mentioned. The said *S. Oviatt* acted under a power of attorney, executed by the defendant *T. S. Benson,* as follows:—

The power of attorney recited the charter-party throughout, and then appointed *Oviatt* "to be the true and lawful agent and attorney of *Benson,* for him and in his name, &c. to go on board the ship *Benson,* and there to remain during the whole of the said intended voyage, and until the return of the ship to the port of London, to take upon himself the sole management, &c. of the ship's stores and provisions during the voyage, and to order and purchase all such supplies, and other articles, as should be required for the use of the ship during the voyage; to draw all such bills of exchange as might be requisite to be drawn upon *T. S. Benson,* in payment of all supplies and otherwise, as *Oviatt* should deem necessary and expedient; in case the ship should be detained at Calcutta, more than ninety days, to ask, demand, sue for, recover and receive from *Betham,* the 1,000*l.* stipulated by the charter-party to be paid to the agent of *T. S. Benson,* and to accept payment thereof either in money or good bills, as he, *Oviatt* should approve; to ask, &c. from *Betham,* the further sum of 1,000*l.* at the expiration of every sixty days after the said ninety days which the ship should lie at Calcutta, and upon receipt thereof respectively to give proper discharges for the same, and to remit all approved bills of exchange which should be received by *Oviatt* from *Betham,* in payment of the freight of the ship's homeward cargo, to Messrs. *Buckles* & Co. in London, as trustees as aforesaid; to ask, &c. payment for all such provisions belonging to the owners of the ship, as he, *Oviatt,*

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should issue, or cause to be issued, for the use of, or which should be consumed by, any of the ship's passengers, and to render to *Betham*, once in every week, a true account of all such provisions, and the prices charged for the same, and upon payment thereof to give proper discharges for the same; to receive all freight stipulated by the charter-party to be paid by *Betham* to the agent of *T. S. Benson* for the time being, for all such additional time as the ship should be employed or detained in any intermediate voyage or voyages by virtue of the charter-party, and to accept payment thereof in money, or to take good security for the same, to the satisfaction of him, *Oviatt*, and to give proper discharges for the same; in case *Betham* should happen to die, or become divested of the command of the ship by reason of any breach of the promises or agreements on his part, contained in the charter-party, to appoint some proper person to be the commander of the ship in the place of *Betham;* in case of any default on the part of *Betham* in payment at Calcutta to him, *Oviatt*, as the agent of *T. S. Benson*, of either of the sums of 1,000*l.*, to load the ship with a cargo of East India produce for England, on account of the owners of the ship for the time being; and, generally, for *T. S. Benson* to do, or cause to be done, all and every such further and other lawful acts, deeds, matters and things whatsoever, as should be requisite and necessary to be done and performed in execution of the charter-party, and in relation to the ship and her freight," &c.

Oviatt carried out with him the charter-party, and communicated it to the plaintiffs, as soon as he arrived at Calcutta, and before the shipping of the goods; and the plaintiffs before that time read the charter-party, and received a copy thereof. For the freight of the sugar and indigo, in the bill of lading mentioned, the plaintiffs drew bills upon other persons, payable sixty days after the ship's arrival in London, to the order of the said Messrs. *Buckles* & Co., which bills they delivered to *Oviatt*, to be remitted to Messrs. *Buckles* & Co., pursuant to the stipulations in the

charter-party; and the said bills were so remitted. *Betham* employed the plaintiffs as his agents at Calcutta, who acted as his agents, and collected and paid over to him the freight of the goods carried in the ship from London to Calcutta, and procured freight for him on the voyage from Calcutta to London; and they had a commission from him for procuring such freight. The ship sailed on her voyage from the River Hooghly to London, with the said sugar and indigo on board; but the sugar and indigo never were delivered to the plaintiffs, or their assigns, pursuant to the bill of lading, although no act of God, the king's enemies, fire, or any other dangers or accidents of the seas, rivers, or navigation, of what nature or kind soever, prevented the same from being so delivered; but, on the contrary, 1651 bags of the sugar, and 12 chests of the indigo, were wholly lost to the plaintiffs, and the residue greatly lessened in value, &c. concluding in the usual form.

Parke, for the plaintiffs.—The question in this case is, whether the defendants, as the owners of the ship *Benson*, are liable for the loss of goods shipped on board of her by the plaintiffs, under bills of lading signed by the master, according to the terms of the charter-party; and that question mainly depends upon what are to be considered as the true meaning and legal operation of the charter-party. It is submitted that the charter-party is only a special appointment of a commander to the ship, not a demise of the ship itself, and therefore that the defendants, as owners, are liable. There are clearly no words of demise in the charter-party. If there had been, *Betham*, instead of being merely the commander, would have been constituted owner of the ship *pro hâc vice;* but he is appointed commander in special and guarded terms, and subject to certain specified restrictions. The instrument always speaks of him as *commander*. He is to take upon himself the command of the ship, and if he commits any breach of any of his promises or agreements, he is to be removable by the agent of the

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owners. The effect, therefore, of the instrument, is simply to appoint *Betham* commander, and to make a particular arrangement, out of the common course of wages, for his remuneration, by his guaranteeing a certain sum for freight to the owners, and reserving the surplus for himself. That being in fact the substance of the charter-party, it is clear that the defendants, as the owners of the ship, are in law liable to this action. *Boucher* v. *Lawson* (*a*), is the leading case upon this subject. "That was an action brought against the owner, to recover the value of Portugal coin delivered to the master at Lisbon, to be conveyed to London, and of which, by the usage of that particular trade, the master was to receive the freight to his own use, and which the master had embezzled. The Court held, that if it had appeared that the ship was employed in carrying goods for hire, the owner would have been answerable for this loss; for although the exportation of coin was prohibited by the laws of Portugal, yet the importation of it into this country was allowed by our laws, and so the trade was lawful here; and it was of no consequence whether the master was rewarded for his services by wages paid by the owner, or by receiving part of the earnings of the ship; but, as it did not appear that the ship was employed in carrying goods for hire, but for any thing that appeared in the case, the ship might have been sent to Lisbon for a special purpose, and if so, (as the Chief Justice said,) no man could say that the master, by taking in goods of his own head, could make the owners liable (*b*): it was decided that the plaintiff should not recover." That is, in principle, precisely the present case, and must be decisive of it. In *Parish* v. *Crawford* (*c*), "the defendant, the owner, had chartered the ship to *Fletcher* for the voyage, for a certain sum, and *Fletcher* was to have the freight of goods, but the freight of passengers was reserved to the defendant; and the defendant appointed the master, and covenanted with *Fletcher* for the condition

(*a*) Cas. temp. Hardw. 85.
(*b*) *Pate* v. *West*, ib. 88.
(*c*) 2 Stra. 1251; Abbott on Shipping, 4th ed. 22, 5th ed. 19.

of the ship and behaviour of the master. *Fletcher* took on board moidores and other goods of the plaintiff and other persons, and received the freight for them. The action was brought against the defendant, as owner, for not delivering the moidores. For the defendant it was objected, that although the ship was his property, yet he was not owner in such a manner as to be liable to this action, but that *Fletcher* was for this purpose the owner. Chief Justice *Lee*, however, was of opinion that the action might be maintained, and the plaintiff recovered." The remaining cases on the subject are distinguishable from the present. In *James* v. *Jones* (*a*), "the action was brought against the defendants as ship-owners, for the loss of a quantity of raisins on a voyage from Faro to London. *Thomas*, the master, had in his own name as master, and in the absence of the owners, chartered the ship to *Reed*, on a voyage from Falmouth to Faro and back to London; and *Reed* engaged by the charter-party to provide a full lading from Faro, and to pay a stipulated price per ton. The raisins were shipped at Faro, by the consent of *Reed*'s agent at that place, and the master signed a bill of lading, engaging to deliver them to the plaintiff, '*he paying freight per charter-party.*' These facts appearing at the trial, Lord *Kenyon* was of opinion that *Reed* was, with respect to the plaintiff, the owner of the ship, *pro hâc vice;* that the defendants were not responsible to him; and, consequently, that the plaintiff could not maintain his action." So, in *Mackenzie* v. *Rowe* (*b*), "a ship had been chartered by the defendants, who were the registered owners, to *De Beur*, on a voyage from London to Surinam, and was afterwards put up by him as a general ship, and the plaintiff shipped a quantity of oats, which

(*a*) 3 Esp. N. P. C. 27; Abbott on Shipping, 4th ed. 23, 5th ed. 20.

(*b*) 2 Campb. 482; Abbott, 4th ed. 24, 5th ed. 21. And see Ib. 22, where it is said, "probably the case of *Parish* v. *Crawford*, is not to be considered as law; for although the absolute owner might in each of these three cases be ultimately answerable to the charterer of the ship, yet there was no contract, either express or implied, between him and the proprietors of the goods."

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were improperly sold by the master, and for which the action was brought. The Chief Justice held the defendants not answerable, and the plaintiff was nonsuited." These, however, as has been already observed, do not touch the present case, which is governed by that of *Boucher* v. *Lawson*, from which, in principle, it is not distinguishable.

Campbell, contrà.—Upon the facts found by the special verdict, it is clear that this action cannot be maintained. This is an action upon a contract; and yet there is no contract existing between the parties. It is called an action on the case, but it is in its real nature an action, not *ex delicto*, but *ex contractu;* for though a count in trover was, and strictly speaking might well be joined to the special counts, still the cause of action does not arise out of any common law obligation, but purely and entirely out of a special contract, supposed to have subsisted between the parties. There are many instances of actions on the case for negligence or misfeazance, where a contract, as in assumpsit, is the basis of the action; and this is one of them. Here a duty is alleged on the part of the defendants, to carry and deliver the goods; that was no common law obligation; something must have been done to create it; that is, if they contracted to carry and deliver the goods, it became their duty to do so; if they had not so contracted, they had no such duty, and they are not liable to this action. The non-joinder of other part owners as defendants, if there had been others omitted, might have been pleaded in abatement, *Powell* v. *Layton* (*a*); where it was held, that to an action on the case in the *form* of *tort*, against one of several joint owners of a ship, for not safely conveying goods which had been delivered to him by the plaintiff for that purpose, the defendant might plead in abatement, that the goods were delivered to him and his partners jointly, and that his partners were not sued; which could only be upon the principle that the action was in *substance* an action upon a con-

(*a*) 2 N. R. 365; and see *post*, 63, (*a*).

tract, because in actions for tort, no advantage can in general be taken in pleading of the non-joinder of a defendant(*a*). In this case a contract is alleged upon the record, and is disproved upon the evidence. The declaration alleges that the goods were to be safely carried and delivered by the defendants, "for certain freight and reward, payable on that behalf." That can only mean that the freight was payable to the defendants, whereas in fact the freight was not payable to them, but to *Betham*, and that with the knowledge of the plaintiffs; therefore the evidence disproves the consideration as alleged. Then, trying the case upon the effect and meaning of the charter-party, it is perfectly clear that by that instrument the defendants are not treated as the carriers of the goods, and that *Betham* is; and, it is admitted, that the contents of the charter-party were made known to the plaintiffs, before they shipped the goods. If the contents and existence of the charter-party had been concealed from the plaintiffs, then perhaps they might safely have relied upon the general liability of the defendants as shipowners; but the special verdict deprives them of that benefit, because it finds expressly, that the charter-party was made and executed *bonâ fide*, and that the contents of it were communicated to the plaintiffs, before they shipped the goods. Then what is the effect of the charter-party? It first appoints a master to the ship, and then goes on to charter the ship to him. And that may lawfully be done. The owner of a ship may either act as master of her himself; or he may enter into a contract with the master, whereby he charters the ship to him. What is there to differ the present from other ordinary charter-parties? In reality nothing. *Betham* had power, upon his arrival at Calcutta, to convert the ship into a general ship, like any other freighter. It is said that the charter-party does not contain words of demise. Perhaps not; but that is immaterial; for the general object of the instrument evidently is to let the ship

(*a*) *Bretherton* v. *Wood*, 3 Brod. & Bingh. 54; 6 B. Moore, 141; 9 Price, 408. As to the distinction between tort and contract, in actions against carriers, see *Dale* v. *Hall*, 1 Selw. N. P. 7th ed. 408; *Ansell* v. *Waterhouse*, 2 Chitt. Rep. 1.

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out to *Betham* for hire, which brings this case within the principle laid down in all the cases, in no one of which will it be found that the charter-party contained actual words of demise. *Betham* had a control over the loading of the ship; and with respect to the homeward voyage, he was to pay freight whether the ship was loaded or not. Suppose the charter-party had been between three parties, namely, the defendants, *Betham*, and *A. B.*, with power to *A. B.* to load, &c.; in that case *A. B.* alone would have been liable to the shipper of goods; and in the present case, therefore, *Betham* alone is liable. The circumstance of an agent of the defendants being on board can make no difference in the case; he had only to take care of the stores; he had nothing to do with the loading or unloading of the ship. The owners in this case could not have maintained an action against the shippers of the goods for the freight, for there was no privity between them; neither, for the same reason, can the shippers sue the owners for the loss of the goods. Then the general question arises, whether in an action upon a contract to carry goods, where there is a charter-party, the owner of the ship is liable. It is confidently submitted that he is not, and that no such action can be supported by a shipper against an owner. *Boucher* v. *Lawson* was a very different case from the present; for there the master was paid, *as* master, the freight of the coin. *Parish* v. *Crawford*, it must be admitted, is in point, and seems to bear against the present defendants; but that was only a Nisi Prius decision, and is met by two subsequent contrary decisions in *James* v. *Jones*, and *Mackenzie* v. *Rowe*. Besides, in *Parish* v. *Crawford* it did not appear that the plaintiff, the shipper of the goods, knew the fact of the ship having been chartered by the owner to *Fletcher;* which does appear in the present case, and forms a most important distinction between the two cases. [*Bayley*, J. There the owner covenanted with the charterer for the condition of the ship, and the behaviour of the master; there is no such covenant by the owner here.] *James* v. *Jones* is expressly in point for the defendants here; for

there the ship was chartered by the master to *Reed*, and *Reed* was held to be the owner *pro hâc vice*. *Mackenzie* v. *Rowe* goes the same length. *Betham* was the freighter of the ship; he is frequently so named in the charter-party; and it is a general principle that the freighter of a ship is considered as the owner *pro hâc vice*. In *Rich* v. *Coe* (*a*), an action by a shipwright against shipowners for the price of repairs done, where it was held, that whoever supplies a ship with necessaries has a treble security; first, the person of the master; secondly, the specific ship; and thirdly, the personal security of the owner; Lord *Mansfield* said, "the defendants are the owners, and there happens to be a private agreement between them and the master, by which he is to have the sole conduct and management of the ship, and to keep her in repair; but this cannot affect the creditors, who are total strangers to the transaction. To be sure, if it appeared that a tradesman had notice of such a contract, and in consequence of it gave credit to the captain individually, as the responsible person, particular circumstances of that sort might afford a ground to say, he meant to absolve the owners, and to look singly to the personal security of the master. But here there was no notice whatever of the contract." Here the shippers had notice that the ship was chartered to *Betham*, and therefore they must be taken to have shipped the goods upon his responsibility, and his only.

Parke, in reply. If this is to be considered as an action *ex contractu*, there is still sufficient privity of contract between the plaintiffs and the defendants, to entitle the former to sue the latter. *Betham* was the captain and servant of the defendants, and through him the defendants contracted with the plaintiffs safely to carry and deliver their goods. The plaintiffs' knowledge of the charter-party is quite immaterial, because the charter-party itself does not demise the ship to *Betham*, nor divest the defendants of

(*a*) Cowper, 636; Abbott on Shipping, 4th ed. 125, 134, 5th ed. 100, 109.

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the legal possession of her: they had always the power, through their agent, to oust *Betham* from the command of the ship, which was all he ever had; and that he had, not as his own, or for any time certain, but merely as a servant, and *quamdiu se bene gesserit*.

Cur. adv. vult.

Judgment was now delivered by

Lord TENTERDEN, C. J.—This was an action by the plaintiffs, who had shipped certain goods on board a ship of which the defendants were the owners, at Calcutta, for London, which were lost; and was brought against the defendants, as the owners, to recover the value of the goods. The goods were shipped, and the bills of lading signed by *Betham*, who was the master of the ship. These and other facts were found by a special verdict. The defendants rested their defence upon the effect of an instrument called a charter-party, which had been made between one of them, on the part of himself and the other owners, and *Betham*, before the ship sailed on her outward voyage from London to Calcutta; and it was contended, on their behalf, that they having chartered the ship to *Betham*, were not liable as owners for the loss of goods shipped to be conveyed on the voyage for which the ship was so chartered. The special verdict sets forth at length the instrument called a charter-party. It is dated the 7th of June, 1816, and is made by *Benson*, one of the defendants, as owner of the ship, on behalf of himself and the other owners, with *Betham*, who is called in the course of it, indiscriminately, commander, and freighter, of the ship. (Here his lordship recapitulated the charter-party and the special verdict at considerable length, and then proceeded.) Now the question is, whether the owners of the ship were by this instrument, executed between them and the master of the ship, to be considered as having chartered their ship in such a manner to the master, as to release them from the responsibility which would otherwise attach to them by the general rule of law, as owners of the ship, for the safety of goods

shipped on board their ship. Upon consideration of the case, we are of opinion that they are not released by that instrument; for, taking the whole together, it appears to be in substance nothing more than an appointment of a master, upon an undertaking by him that the ship shall earn a certain sum, and an arrangement that all beyond that sum is to be for his benefit, and that all loss shall be made good by him, and that he shall secure the performance of that undertaking. It would be opening a door to fraud, would create great confusion, and produce much mischief, as far as regards persons who send goods by ships, if it were competent for ship-owners to release themselves from their common law liability by entering into such a contract, and executing such an instrument as this. It was argued in this case that the plaintiffs, the shippers of the goods, were informed of the nature of the contract entered into between the defendants and *Betham;* but if the effect of that contract was not, as the defendants contend, to release them from their general responsibility, that circumstance can make no difference in the case. We are of opinion that the contract had no such effect, and consequently that the plaintiffs are entitled to maintain this action. The judgment of the Court, therefore, must be for the plaintiffs.

Postea to the plaintiffs (*a*).

(*a*) This case was first tried at the sittings after Hilary term, 1820, when the plaintiffs were nonsuited. Upon a motion to set aside the nonsuit in the following Easter term, a special case was directed. Upon the argument of the special case at the sittings before Michaelmas term, 1821, the Court granted a new trial, which came on at the adjourned sittings after Michaelmas term, 1826-7, when the above special verdict was found. Counsel for the plaintiffs, on the first trial, *Gaselee*, *Taddy*, Serjt., *F. Pollock*, and *Parke;* on the second trial, *Taddy*, Serjt., *Denman*, C. S. *F. Pollock*, *Brougham*, and *Parke;* for the defendant, on the first trial, *Copley*, S. G. *Scarlett*, *Vaughan*, Serjt., *Marryat*, *Gurney*, *Arabin*, *Campbell*, and *Chitty;* on the second trial, *Scarlett*, *Marryat*, *Gurney*, *Campbell*, and *Chitty*.

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NOTLEY and others, Assignees of JARMAN, a Bankrupt, *v.* BUCK.

A. obtains a judgment by confession or by *nil dicit* against *B.*, and issues a *fi. fa.*, under which *B.*'s goods are seized: whilst the goods remain unsold in the sheriff's hands, *B.* commits an act of bankruptcy, on which a commission is issued. The sheriff, after notice of the commission, sells the goods, and pays over the proceeds to *A.* The amount may be recovered from the sheriff by the assignees of *B.*, as money had and received to their use.

Whether the sale by the sheriff, after such notice, was wrongful, and would support an action of trover, *quære.*

THIS was an action for money had and received, brought to recover from the late Sheriff of Devon, the produce of two executions levied by him upon the goods and chattels of the bankrupt, tried before Mr. Justice *Park*, at the Spring Assizes for the county of Devon, 1827, when a verdict was found for the plaintiffs, damages 1,051*l.*, subject to the opinion of the Court upon the following case:—

On the 30th of May, 1826, *Prickman* and *Webber* obtained judgment as of Trinity Term, 7 *Geo.* 4, against *Jarman*, in the Court of Common Pleas, by *nil dicit* for 800*l.* debt, and 6*l.* 13*s.* 11*d.* damages, in a certain action upon a bond dated December 14th, 1819. On the 31st of May, 1826, a writ of *fi. fa.* issued upon this judgment, directed to the Sheriff of Devon, returnable on the 7th of June, indorsed to levy 437*l.* On the same 31st of May, *Richards* and *Chadwell* obtained a judgment as of Trinity Term, 7 *Geo.* 4, for 1,000*l.* debt, and 6*l.* 16*s.* damages, in the Court of King's Bench, against *Jarman*, by *nil dicit* upon a warrant of attorney, dated 2d February, 1825, and duly filed. On the same 31st of May, a writ of *fi. fa.* issued upon this judgment, also directed to the Sheriff of Devon, returnable on the 7th of June; under both these writs of *fi. fa.*, the defendant being sheriff, seized the goods and chattels of *Jarman*, part whereof was liable for excise duty, on the 2d of June, 1826. On the 9th of June, 1826, whilst the said goods and chattels remained in the possession of the defendant, as such sheriff, under the said writ of *fi. fa.*, and also an extent at the suit of his Majesty for 68*l.* 15*s.* 7½*d.* for excise duty, due from *Jarman* to his Majesty, unsold, *Jarman* committed an act of bankruptcy, upon which a commission of bankrupt issued on the 24th of July, and on which he was declared a bankrupt on the 9th of August, and the plaintiffs were afterwards duly appointed his assignees. On the 12th of August, 1826,

the defendant, as such sheriff, having notice of the said commission, sold the goods and chattels so seized, and after satisfying the extent, paid over the net proceeds of such sale, amounting to the sum of 1,051*l.* to the respective creditors, at whose suits the several writs of *fi. fa.* above mentioned had issued. If the Court shall be of opinion that the property in the goods and chattels above mentioned, or the right to receive the proceeds of the sale thereof, after satisfaction of the said extent, passed to or vested in the plaintiffs, as assignees of *Jarman*, then the verdict is to stand, otherwise it is to be set aside and a nonsuit entered.

Manning, for the plaintiffs. This is a question upon 6 *Geo.* 4, c. 16, s. 108 (*a*). Two cases have already come before the Court upon the construction of this section. *Taylor* v. *Taylor* (*b*), was an application to set aside an execution issued upon a judgment by *nil dicit*. There the Court refused to interfere in the summary way prayed, but said that the assignees might bring trover against the sheriff, if the true construction of the act were that the execution was defeated. Here the assignees have not sued the sheriff in trover, but have waived the tort, and brought an action for money had and received (*c*). The other case was *Wymer* v. *Kemble* (*d*), in which a creditor, who had obtained judgment by *non sum informatus*, issued a *fi. fa.* and took a bill of sale

(*a*) Which enacts that "no creditor having security for his debt, or having made any attachment in London, or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent, served and levied by seizure upon, or any mortgage of or lien upon any part of the property of such bankrupt before the bankruptcy, provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors."

(*b*) 8 D. & R. 159; 5 B. & C 392.

(*c*) *Lightly* v. *Clouston*, 1 Taunt. 112; *Reed* v. *James*, 1 Stark. N. P. C. 134.

(*d*) 6 B. & C. 479.

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of the goods seized under it, after which the debtor became bankrupt, and the assignees seized the goods. The Court held that such seizure was wrongful, for the creditor having been paid by means of the execution, before the bankruptcy occurred, he was not at the time of the bankruptcy a creditor having security. The Court goes on to say, a person who has levied by seizure is such a creditor; he has a security by his right to have the goods sold. So here, the execution creditors, having levied, were creditors having security. Then the statute expressly says, that they shall not receive more than a rateable part of their debt; but if the creditors had no right to receive, it follows that the sheriff, who had notice of all the circumstances, had no right to pay. The payment, therefore, being wrongful, the money is to be considered as still remaining in the hands of the sheriff, who must consequently be liable in the action to the plaintiffs, in whom is vested the right of recovering all the property of the bankrupt, to which no other party can shew a better title.

Coleridge, contrà. The main question for the decision of the Court is, whether any action at law can be maintained under the provisions of this section of the statute. The clause is certainly very indistinct. It may be divided into three parts. First, the general rule, then, the exception, then, the proviso which restrains the exception. The facts stated in this special case come within the words of the proviso, and not within the words of the exception. If they are within the words of the proviso, they are out of the exception, and the clause may be read with the general rule only, and then no action at law is maintainable. It does not appear that the creditors have received more than a rateable share, and it lay upon the plaintiff to shew that the statute has been contravened. The clause in question is substituted for sect. 9 of 21 *Jac.* 1, c. 19, which shews the object and meaning of the provision in this act. The old clause referred only to proceedings before commissioners; so does

the new. A creditor by bond was not to prove for the penalty before the commissioners. The receiving mentioned in the present statute must mean a receiving at the hands of the commissioners. [*Bayley*, J. You would put it that if judgment was signed for more than was really due, the creditor could issue execution only for the real amount of the debt.] No injustice would arise if the application for a rateable distribution were made to the commissioners, or to the great seal. Such a course would be attended with much less expense and delay than must attend an action against the plaintiff. It must be contended, on the part of the plaintiffs, that this execution is void. Now the clause does not in terms avoid it. The creditor is only not to avail himself of it beyond a certain extent; to that extent then he is to avail himself of it. If so, it cannot be void. [*Bayley*, J. The plaintiffs say that the sale is void.] In *Taylor* v. *Taylor*, *Holroyd*, J. expresses his doubts as to the right of the assignees to maintain an action. The decision in *Wymer* v. *Kemble* does not apply to the present case; there the Court held that the party was entirely out of the clause. But it is submitted that the words of the act do not limit the proviso to the exception. The proviso has a wider range than the exception, and shews that the legislature had in view proceedings before the commissioners. No laches is imputable to the execution creditors for not selling, inasmuch as no sale could take place under the *fi. fa.* without first satisfying the extent.

Manning, in reply. In *Gibbins* v. *Phillips*, which is not yet reported, the Vice Chancellor has lately held that the great seal has no jurisdiction to make a creditor refund until he comes in to prove under the commission; so that if this action will not lie, there is no mode of recovering the money. It would be very inconvenient if the money were to go, in the first instance, into the hands of the creditor, who, having a bonâ fide claim upon the debtor to the full amount of the money which he had received, might not

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feel himself under a strong legal or moral obligation to refund what he should ultimately have appeared to have received beyond his fair proportion of the assets. But it is not only said that the creditor may be compelled to refund before the commissioners, but that it is also a more convenient course than an action at law. This, however, is not the true question. The plaintiffs say, that the creditors ought never to have received the proceeds of the sale, and that the sheriff should have paid those proceeds directly to them, in which case neither action nor application to the commissioners would have been necessary. If the sheriff might have retained the money until some decision took place as to the mode in which it was to be distributed, it is sufficient to say that he has not chosen to do so.

Cur. adv. vult.

Lord TENTERDEN, C. J. now delivered the judgment of the Court. After adverting to the facts stated in the special case, his lordship said the question here arises upon the 108th section of the last Bankrupt Act. Both judgments are within the words of the proviso. The intention of the legislature was to prevent the estates of bankrupts from being burthened with voluntary judgments. The words of the act perhaps go beyond the intention of its framers. The difficulty is, as to the mode of giving effect to that intention. Upon consideration of this case, it appears to us that the only satisfactory mode of giving effect to the act of parliament is, that the creditor, under these circumstances, should be prevented from receiving the moneys produced from the sale of the goods taken in execution. If the creditor is allowed to receive this money, he will most frequently receive more than he is entitled to. If he is allowed to receive more money than he is entitled to, there must be some mode by which the assignees may recover it of him. The receipt of the money, in the first instance, by the creditor, where he is liable to refund, can be of no use

to him if he is able to refund, and if he is not able, the object of the statute would be defeated. The safer course, therefore, appears to be to say that he ought not to receive it; and if he ought not to receive, and does receive, then he will have received money belonging not to himself, but to the assignees, and consequently he will be liable to an action, at their suit, for money had and received to their use. Taking this to be the true effect of the statute as to the execution creditor, what will be the duty of the sheriff having notice? No other reasonable answer can be given to that question than to say, that it is his duty to pay the money to the assignees, to whom it does belong, and not to the execution creditor, to whom it does not belong. This being the sheriff's duty according to the statute, if he does pay the money to the creditor, he places himself in the ordinary situation of a man who, having received money, thinks fit to hand it over to a party not entitled to receive it. Such payment could be no discharge. He would still be liable to pay the assignees, to whom the money belonged. The seizure being prior to the act of bankruptcy, it is unnecessary to say whether the sale was lawful or not. The sale may be lawful, and yet the proceeds may belong to the assignees; or, if the sale be not lawful, the tort may be waived. The sheriff may, certainly, in some cases, be placed in a situation of considerable difficulty; but this difficulty is of the same kind as in the case of an alleged prior act of bankruptcy, and he has the same means of redress. For these reasons we are of opinion that the plaintiffs are entitled to recover, and that the postea must be delivered to them.

Postea to the plaintiffs.

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WOODARD v. DOWSING.

Written slander tending to bring the plaintiff into public hatred and contempt is actionable; as when an overseer is charged with oppressive conduct towards paupers, in compelling them to receive payment of their weekly parish allowance in orders for flour upon a particular tradesman.

ACTION for a libel. The first count stated, that before and at the time of the committing of the grievances, &c. plaintiff was an overseer of the parish of Wickham-Market, in the county of Suffolk, and had always, during the time of his being such overseer, behaved and conducted himself righteously, &c. in the execution of his said office of overseer, and never was guilty of any illiberal or illegal conduct towards the poor of the parish, or any other person whatsoever, nor until, &c. was ever suspected, &c. Yet defendant well knowing, &c. but greatly envying, &c. and contriving, &c. to injure plaintiff in his said good name, &c. and to cause it to be suspected and believed by neighbours and subjects that he, plaintiff, had been guilty of the offences and misconduct hereinafter mentioned to have been charged upon and imputed to him, and to vex, harass, &c. heretofore, to wit, on, &c. at, &c. falsely and wickedly did compose, publish, and cause and procure to be composed and published, of and concerning plaintiff, and of and concerning his conduct as such overseer as aforesaid, a false, scandalous, malicious and defamatory libel, containing, among other things, the false, scandalous, malicious, defamatory and libellous matter following, of and concerning the said plaintiff, and of and concerning his conduct as such overseer as aforesaid; that is to say, "Oyes, Oyes, in consequence of the illegal and illiberal practice being still continued in the parish, (meaning the parish aforesaid,) of forcing an order, in lieu of money, on certain poor persons, (meaning certain poor persons of the parish aforesaid,) who through necessity are obliged to seek parish relief, (thereby meaning relief from the said parish,) by which illegal proceedings such poor persons are compelled, against both their wishes and interest, to procure flour from one person only, to the injury of others in the trade, as well as a loss to the persons so confined, arising from the difference in price, this unlawful practice being carried on in defiance of an act of

parliament prohibiting such illiberal conduct, under a penalty of 100*l.*, and in spite of a caution given to prevent such an abuse of the parish money, (meaning the public money of the parish aforesaid,) notice is hereby given, that in case such a system is, after this second public notice to prevent it, again adhered to, and information of the same be given to *J. C. Dowsing*, (meaning the said defendant,) on the Hill, it shall not fail being seen into, and the penalty enforced, for the benefit of the poor thus imposed upon, (thereby, then and there meaning, that the said plaintiff, as such overseer as aforesaid, amongst others, had been and was guilty of illiberal and illegal practices, to wit, in the county aforesaid)." The second count differed from the first, in stating that defendant published "of and concerning the said plaintiff, and of and concerning his conduct *towards divers of the poor of the said parish*, as such overseer as aforesaid, a certain other false, scandalous, malicious and defamatory libel, in the form of a notice, published *and publicly cried and read in the said parish*, containing, amongst other things, the false, scandalous, malicious, defamatory and libellous matter following, of and concerning the said plaintiff, and of and concerning his said conduct as such overseer as aforesaid, *towards the poor of the said parish*; that is to say, "Oyes," &c. The third count varied from the first by concluding thus—"This unlawful practice being carried on in defiance of an act of parliament (meaning that the same was carried on by the said plaintiff as such overseer as aforesaid, among others,) prohibiting such illiberal conduct under a penalty of 100*l.*, and in spite of a caution given to prevent such an abuse of the parish money, notice is hereby given, that if such a system is, after this second public notice to prevent it, again adhered to, and information of the same be given to *J. C. Dowsing*, (meaning the said defendant,) on the Hill, it shall not fail being seen into, and the penalty enforced, for the benefit of the poor thus imposed upon." The defendant pleaded, first, not guilty; secondly, *actio non*, "because, he says, that

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long before and at the time of the publication, one *John Catton* had been and was then the acting overseer of the poor of the said parish of Wickham-Market, and that as such overseer as aforesaid, he the said *John Catton* heretofore, to wit, on the 1st day of December, 1824, and on divers other days and times between that day, and the several days and times of publishing the said supposed libels, illegally and illiberally forced and compelled *Elizabeth* the wife of *John Care*, *Elizabeth* the wife of *John Palmer*, and *Mary* the wife of *Henry Kemp*, then being respectively poor persons of the said parish of W. M., and seeking for and entitled to relief from the said parish, to accept and take of and from the said *John Catton*, so being such overseer as aforesaid, divers orders for flour, as weekly allowances from the said parish, upon one *John Lewin*, (which *John Lewin*, for and during all the time aforesaid carried on the business of a miller and dealer in flour, and was also one of the churchwardens of the said parish of W. M.,) whereby such poor persons respectively were forced and obliged, both against their wishes and interest, to take and receive flour from the said *John Lewin* upon such orders, at higher rates and prices than they otherwise might and could have been supplied with from other persons, if they had received relief in money, to wit, in W. M. aforesaid. And which illegal and illiberal practice, at the time of publishing the supposed libels, did continue in the said parish, wherefore the said defendant, at the said several times when, &c. in the said declaration mentioned, published the said supposed libels therein mentioned, as it was lawful for him to do for the cause aforesaid; and this, &c. wherefore, &c. Replication, *de injuriâ suâ propriâ, absque tali causâ.* At the trial before *Garrow, B.* at the last assizes for the county of Suffolk (*a*), a verdict was found for the plaintiff upon both the issues, damages 20*s*.

(*a*) Counsel for the plaintiff, *Storks*, Serjt. and *F. Kelly;* for the defendant, *Eagle* and *B. Andrews.*

Tindal, S. G. now moved in arrest of judgment. The supposed libel does not convey any imputation which can make it the subject of an action. It is not alleged that the defendant gave an order on his own shop, but on some other tradesman in the parish. The defendant clearly mistook the operation of 55 *Geo.* 3, c. 139 (*a*), in supposing that the conduct of the plaintiff was within that statute. The act relates only to the furnishing of goods to workhouses and to the public. In *Proctor* v. *Manwaring* (*b*), it was held that the penalty was not incurred by an overseer, who, on receiving an order for the relief of *A.* pays part in money, and with the consent of *A.* makes up the remainder in goods from his shop. In that case, *Bayley*, J. says, "where a pauper carries an order for relief to the overseer, he has a right to demand it in money." [*Bayley*, J. There it was the party's own choice.] The term "illiberal" was used by the defendant merely with reference to the supposed violation of the law, in which point he was grossly mistaken. The defendant has been harassed with four actions, each of the churchwardens and overseers having thought proper to sue. [*Bayley*, J. Can that make any difference?] Nothing is said concerning the plaintiff individually. [Lord *Tenterden*, C. J. It must be taken to have been proved that the libel was "of and concerning" the plaintiff. *Bayley*, J. The plaintiff's conduct is charged to be illegal as to the paupers, and as illiberal as to other tradesmen. *Holroyd*, J. That which tends to degrade is a libel.] That is only where the facts are kept back, from which other people may draw a different conclusion.

Lord TENTERDEN, C. J.—This is a case of written slander, in which shape, whatever tends to bring a party into public hatred and disgrace is actionable. The writer of this libel was mistaken in supposing that the conduct of which he complains was within the act of parliament (*c*).

(*a*) Sect. 6.
(*b*) 3 B. & A. 145.
(*c*) 55 *Geo.* 3, c. 139, s. 6.

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Can any man read this libel without saying that it charges the plaintiff with oppressive conduct?

BAYLEY, J.—The libel charges a breach of duty, and oppression.

HOLROYD, J. and LITTLEDALE, J. concurred.

Judgment for the plaintiff.

GROCOCK *v.* COOPER, EVANS and JAY.

Where a witness summoned to give evidence before commissioners of bankrupt, refuses to appear, they may issue their warrant for his apprehension, without having information *upon oath* of such refusal.

In an action by such witness against the commissioners for false imprisonment, the reasonableness of the summons, and of the tender of expenses, is a question of fact, for the jury.

TRESPASS for an assault and false imprisonment. Plea, not guilty, and issue thereon. At the trial before Lord *Tenterden*, C. J., at the London Adjourned Sittings after last Trinity Term (*a*), the case was this:—The plaintiff was a linen draper, till recently before the transaction which gave rise to this suit, residing at or near Norwich, but being at that particular time in London. The defendants, *Cooper* and *Evans*, were commisssioners, and the defendant *Jay* was messenger, under a commission of bankrupt, which had issued against two manufacturers at Norwich named *Silvey* and *Saunderson*. The commissioners issued their summons, requiring the plaintiff to appear before them at Norwich, at ten in the morning of Tuesday, the 8th of April, 1826, for the purpose of being examined, touching the affairs of the bankrupts. This summons was personally served upon the plaintiff in London, at five in the afternoon of Monday, the 7th, and a sum of 5*l.* was at the same time offered to him to pay his expenses. The plaintiff said he had business of his own to attend to in London the next day, and he could not go; but he did not then object to the notice as being too short, or to the conduct money as being too little. The person who had served the plaintiff with the summons, sent by the same night's post a written account, *not verified by affidavit*, of his having done so, and

(*a*) Counsel for the plaintiff, *Scarlett*, *Campbell*, and *Busby*; for the defendants, *Tindal*, *S. G.* and *E. Alderson*.

of the plaintiff's rufusal to appear; whereupon the commissioners issued their warrant for the plaintiff's apprehension, under which he was apprehended by the messenger, on the evening of the following Thursday. He was taken that night in custody to Norwich, where he was detained till eight in the evening of the next day, Friday, when he was examined by the commissioners and discharged. For this arrest and imprisonment the action was brought. It appeared that there were four stage coaches which went from London to Norwich in the night of Monday the 7th of April, leaving London after five in the afternoon, and arriving at Norwich before ten the next morning. Upon these facts it was contended for the defendants, that as there was no evidence to shew that the plaintiff had not, when served with the summons, made known any lawful impediment to his obeying it, he had not brought himself within the exception of the statute (*a*), by virtue of which he had been summoned, and consequently must be nonsuited. For the plaintiff, it was insisted that the act contemplated

(*a*) 6 *Geo.* 4, c. 16, s. 33, which enacts, "that after adjudication, it shall be lawful for the commissioners, by writing under their hands, to summon before them any person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, or any person whom the commissioners believe capable of giving information concerning the person, trade, dealings, or estate of such bankrupt, or concerning any act or acts of bankruptcy committed by him, or any information material to the full disclosure of the dealings of the bankrupt; and it shall be lawful for the said commissioners to require such person to produce any books, papers, deeds, writings, or other documents in his custody or power, which may appear to the commissioners necessary to the verification of the deposition of such person, or to the full disclosure of any of the matters which the commissioners are authorized to inquire into; and if such person *so summoned* as aforesaid *shall not come* before the commissioners *at the time appointed, having no lawful impediment, (made known to the said commissioners at the time of their meeting, and allowed by them,)* it shall be lawful for the said commissioners, by warrant under their hands and seals, to authorize and direct the person or persons therein named for that purpose, to apprehend and arrest such person, and bring him before them to be examined as aforesaid."

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reasonable notice to obey the summons; that the party was not bound to object to the notice when served with the summons; that the notice here was clearly unreasonable; and that at all events, that was a question for the jury. The Lord Chief Justice thought the objection fatal, and under his directions the plaintiff was nonsuited. In Michaelmas Term, a rule was obtained for setting aside the nonsuit and for a new trial, on several grounds; first, that it was not necessary to object to the period of notice given by the summons, at the time of its service, or to the amount of the conduct money tendered, at the time of its tender; secondly, that the question whether the notice was reasonable, and the conduct money sufficient, was a question of fact, which should have been left to the jury; thirdly, that the warrant of the commissioners for the plaintiff's apprehension was illegal, having been issued on information not on oath; and that in that point of view, the arrest was illegal, and the action maintainable. Against that rule

Tindal, S. G. and *E. Alderson* shewed cause. The nonsuit was right. First, the only time for objecting to the notice given, or to the expenses tendered, is the time of the service, or the tender. The "lawful impediment" mentioned by sect. 33, is to be "made known to the commissioners at the time of their meeting," and is to be "allowed by them;" which it is impossible it can be, unless the party summoned either communicates it to the summoning officer, or to the commissioners themselves, neither of which the present plaintiff did. Any delay on the part of the commissioners, under circumstances like the present, might defeat their object altogether, for the party summoned would have time to abscond, and the information, or the property sought to be obtained from him, would thus be lost for ever. Secondly, the notice was reasonable, and the conduct money sufficient. It was proved that there were four coaches travelling nightly from London to Norwich, two of which, it is notorious, are mails, starting as late as eight in the

evening, and all of which reach Norwich before ten in the morning; and the plaintiff might and ought to have gone by one of those. The conduct money tendered was *5l.*, which it is impossible to say was less than was *necessary* for such a journey, and "necessary expenses" are all the act requires (*a*). Thirdly, it was not necessary that the information of the plaintiff's refusal to appear should have been made to the commissioners *on oath*. The statute does not require it, which it certainly would have done, if such had been the meaning of the legislature; it states merely, that if the person summoned shall not come at the time appointed, having no lawful impediment, &c., the commissioners may issue their warrant for his apprehension. It was clearly intended that, in this respect, commissioners of bankrupt should be put upon a different footing from justices of the peace. An action of trespass will not lie against a justice of the peace for acting upon complaint made to him on oath, even though the facts stated in the complaint afterwards turn out to be false, *Lowther* v. *Earl Radnor* (*b*); but it is quite clear that such an action would lie against commissioners of bankrupt, if the information upon which they arrested a party was proved to be untrue (*c*).

Scarlett and *Campbell*, contrà. It was not necessary in this case, if in any, to object to the summons and the conduct money at the time of the service and the tender, because, in legal effect, no summons was ever served, and

(*a*) 6 *Geo.* 4, c. 16, s. 35, which enacts, "that where any person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, shall be summoned to attend before the said commissioners, every such person shall have such costs and charges as the said commissioners in their discretion shall think fit; and every witness summoned to attend before the commissioners shall have his necessary expenses tendered to him, in like manner as is now by law required upon service of a subpœna to a witness in an action at law."

(*b*) 8 East, 113. And see *Bramwell* v. *Penneck*, *ante*, i. 409, 7 B. & C. 536; *Bartin* v. *Carew*, 5 D. & R. 558, 3 B. & C. 649.

(*c*) But see *Doswell* v. *Impey*, 2 D. & R. 350, 1 B. & C. 163.

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no money ever tendered; they were both so unreasonable as to be in reality nullities. What is the summons? To travel 116 miles in 17 hours from the moment when the summons was served. No man is bound to neglect all his private affairs, for the sake of obeying a summons so unreasonable. True, there were coaches, by which a man, physically, might have performed the journey; but a physical power of obeying the summons is not enough; there must be a reasonable and convenient power also. Could it be contended for a moment that a subpœna so served would be binding upon a witness? Clearly not; and yet the 6 *Geo.* 4, *c.* 16, s. 35, seems expressly to assimilate the service of summonses and tender of expenses under that act, to the service of subpœnas and tender of expenses to witnesses in actions at law. Suppose the party summoned to be a female, or a man of advanced years, and of infirm body; in such cases such a summons could not be supported: and yet where is the line to be drawn? Then what was the conduct money tendered? *5l.*, a sum scarcely sufficient to carry the party to Norwich, and certainly altogether insufficient to pay his expenses back again. But he was clearly entitled to be tendered his full expenses to and fro, and the tender of it is a condition precedent, both to his obeying the summons and his making any objection to it. The plaintiff here was summoned as a witness, and the act expressly states that every witness summoned before the commissioners shall have his necessary expenses tendered him, in like manner as is by law required upon service of a subpœna to a witness in an action at law; and the necessary expenses in the latter case are such as will defray the witness's expenses, *eundo, morando, et redeundo* (*a*). At all events, the reasonableness of the summons and of the tender was a question of fact for the jury; and as it was not left to them, but the plaintiff was nonsuited on those points, the nonsuit cannot be supported. But the main question in this case, and one of very great

(*a*) *Ashton* v. *Haigh*, 2 Chit. Rep. 201. But see *Battye* v. *Gresley*, 8 East, 319.

importance, is, whether information of the plaintiff's refusal to obey the summons, communicated to the commissioners *not upon oath*, authorized them, in point of law, to issue their warrant for his apprehension. It is confidently submitted that it did not. If they can apprehend upon information, not on oath, why should they not on mere surmise, or on speculation, without any information at all? The arrest in this case was upon mere hearsay evidence. Is that to be endured in point of law? The power of the commissioners is a formidable one, and is not to be extended beyond the letter of the statute by which it is created. If the legislature had intended to give them this power of acting upon information, not on oath—a power given to no magistrate in the kingdom—surely they would have conveyed it in clear and express words. Great inconvenience and grievous oppression may be the consequence of giving an implied, undefined, and anomalous power like this, to commissioners of bankrupt. The warrant for the party's apprehension states, that it has been *proved* before the commissioners that the summons was duly served, and that the party refused to appear; which must mean, that those facts have been deposed on oath. That is a necessary allegation, but in the present case it is a false one; for it is admitted that no information on oath was made to the commissioners. The general principle of English law is, that no person can be arrested except upon information on oath; and there is nothing in this act of parliament to exempt these particular officers from the influence of that general principle. The very fact of a warrant being issued, implies that information has been given on oath, to justify the granting of such warrant; for the rule is, that where the information is not upon oath, a summons only can be issued.

Cur. adv. vult.

Judgment was afterwards delivered by

Lord TENTERDEN, C. J.—Upon consideration of this case, we are of opinion that the rule for setting aside the

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nonsuit, and for granting a new trial, must be made absolute. Not upon the ground that the information of the plaintiff's refusal to appear in obedience to the summons ought to have been on oath, for we are clearly of opinion that it is not requisite that it should be so. But upon the ground that the question of the reasonableness of the notice and of the tender of expenses, was not left to the jury, which we think upon the whole it ought to have been.

Rule absolute.

LOVICK *v.* CROWDER and KELLY.

A., in *March*, fraudulently, and for the mere purpose of protecting the goods, sued out a *fi. fa.* against *B.*, under which *C.*, the *then* sheriff, seized. In *September*, *D.*, a new sheriff, came into office, to whom a *fi. fa.*, sued out by *E.* against *B.*, was delivered. *D.* did not seize, but suffered *C.* to sell under the first *fi. fa.*, and returned *nulla bona* to the second:—Held, that *D.* was liable to *E.* for a false return.

CASE, against the defendants, the sheriffs of London, for a false return of *nulla bona* to a writ of *fieri facias*, sued out by the plaintiff against the goods of one *Harrison*. Plea, not guilty, and issue thereon. At the trial before Lord *Tenterden*, C. J., at the sittings after last Trinity term (*a*), the case was this:—In the month of March, 1825, the then sheriffs of London, Messrs. *Brown* and *Key*, received a writ of *fieri facias* against the goods of one *Harrison*, at the suit of one *M'Nab*. A seizure was made under that writ, but nothing further was done; and it appeared that the writ was intended originally merely to operate as a protection of the goods against writs that might be sued out by other creditors. By the permission and connivance of *M'Nab's* attorney, *Harrison*, with his family, remained in the possession of the goods, and continued to carry on his business as before, from the time of the seizure down to the following month of November. In the intervening month of September, the sheriffs, Messrs. *Brown* and *Key*, went out of office, and were succeeded by the defendants. In the course of the month of November the plaintiff's writ against *Harrison's* goods was sued out and delivered to the defendants, and a warrant to levy

(*a*) Counsel for the plaintiff, *Scarlett*, A. G., and *Platt*; for the defendants, *Gurney* and *Comyn*.

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was made out and delivered to the same officer who held the warrant for *M'Nab's* levy. The former sheriffs then proceeded to sell the goods under *M'Nab's* writ, in which they were not interrupted by the defendants, who returned *nulla bona* to the plaintiff's writ. The sale did not realize sufficient to satisfy *M'Nab's* claim against *Harrison*. It was admitted on the part of the defendants, that *M'Nab's* execution was fraudulent as against the plaintiff; and that if the defendants had seized under *M'Nab's* writ, they would have been bound to sell for the benefit of the plaintiff. But it was contended, that as the former sheriffs had seized under *M'Nab's* writ, the goods were, when the plaintiff's writ came to the defendants, *in custodiâ legis*, from whence the defendants would not have been justified in taking them. The Lord Chief Justice was of opinion, that as the execution was fraudulent, goods seized under it could not be said to be *in custodiâ legis*, and therefore that the defendants ought to have seized them. His lordship, accordingly, directed the jury to find a verdict for the plaintiff, giving leave to the defendants to move to enter a nonsuit. A rule for that purpose having been obtained in last Michaelmas term,

Scarlett and *Platt* now shewed cause. The only question in this case is, whether the change of sheriffs, between the issuing of the two writs, made any difference in the nature and extent of the duties and liabilities thrown upon those officers. That the first execution was fraudulent, was admitted, and could not be denied. The goods were the debtor's, *Harrison's*; they were seized, indeed, *pro formâ*, but they remained in his possession and under his control, and he and his family continued upon the premises, carrying on his business as before. A writ sued out for the mere purpose of protecting those goods from the plaintiff's claim was a nullity; the goods were, in point of law, the property of the debtor, and the defendants were bound to seize them in his behalf. They must be deemed

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to have had notice of the fraudulent circumstances of *M'Nab*'s seizure, because the same officer who received their warrant held the warrant from the former sheriffs. The former sheriffs were merely in the situation of any third persons fraudulently keeping, or rather pretending to keep, possession of goods for the purpose of protecting them from the legal process to which they were liable; and the defendants suffer no hardship in the transaction, because they have acted throughout with their eyes open, and might have protected themselves if they had taken the proper steps for so doing.

Gurney and *Comyn*, contrà. The return of *nulla bona* made by the defendants was true, and this action cannot, therefore, be maintained. The former sheriffs were in possession when the new sheriffs, the defendants, went in; the goods, therefore, were in the custody of the law, and could not be seized. The proof that the former sheriffs continued in possession of the goods is, that they actually sold them. If the plaintiff is entitled to maintain this action, he was also entitled to insist upon the new sheriffs, the defendants, taking the goods in execution, out of the hands of the former sheriffs, and out of the custody of the law. The change of sheriffs is an important feature in this case, and differs it from all those in which questions of this sort have arisen. Where the sheriffs are the same at the issuing of both writs, and the first execution is fraudulent, or is suffered to sleep, the plaintiff under the second execution is entitled to the goods; but that is a very different case from the present: for here the sheriffs were changed, and the former never abandoned the custody of the goods, which could not, therefore, be seized by the new sheriffs, although a second writ was issued against them.

Lord TENTERDEN, C. J.—I am of opinion that the plaintiff is entitled to recover, and therefore that this rule

ought to be discharged. It was admitted at the trial, nor can it with any propriety be denied, that if there had been no change of sheriffs, the plaintiff's writ would have been entitled to priority, and that the sheriffs would have been liable for not seizing under it. But it has been argued that the fact of the sheriffs having been changed varies the case, and that the present sheriffs are not liable in this action, because the goods were in the lawful possession of the former sheriffs, from which they could not be taken. That argument, however, assumes the whole question in the case. Were the goods in the *lawful* possession of the former sheriffs? Were they in the custody of the law? On the contrary, was not the legal process under which they were originally seized fraudulently and colourably issued, and then held off, for the express purpose of evading and defeating other process, which it was expected would be issued by other and *bonâ fide* creditors, for the satisfaction of their debts? The fact was clearly so. *M'Nab*'s possession of the goods, and that of the former sheriffs under him, was fraudulent and colourable from first to last. If the process under which *M'Nab* or the former sheriffs had possession had been a bill of sale, and fraudulent, it is clear, beyond a doubt, that the present sheriffs would have been bound to seize under the plaintiff's writ; and the fact of the persons, so fraudulently holding possession of goods, having been formerly sheriffs, and that they held under a fraudulent writ, instead of a fraudulent bill of sale, can make, in my judgment, no difference whatever in the case. The sheriff must see, at his own peril, that the party who sets him in motion is acting *bonâ fide;* though where he exercises all reasonable caution, and himself acts fairly and *bonâ fide*, he is entitled to apply to the Court for an indemnity from one of two conflicting claimants. Upon principle, however, generally speaking, the sheriff is liable; and it is highly just and proper that he should be so. If it were otherwise, a wide door would be opened for fraud, and the officers of the sheriff, and the debtors against

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whose goods process issued, would be colluding together, for the purpose of making one process the means of defeating another.

BAYLEY, J.—I am clearly of opinion that the goods were liable to seizure under the plaintiff's writ. A creditor, who sues out execution against the goods of his debtor, is bound to be both prompt and honest in the steps he takes to enforce it. Delay always raises a suspicion that the execution was set on foot merely to protect the goods from other creditors; and where that suspicion is confirmed to the satisfaction of a jury, another creditor, who comes in with a subsequent execution, is entitled to priority. That is the present case. The first execution was neither promptly nor honestly enforced. The possession by the old sheriffs was fraudulent and nominal only from the very first. The execution was just kept alive, merely for the purpose of protecting the goods. The goods, in point of law, were *Harrison's* property. The change of sheriffs, therefore, made no possible difference in the case; for if the goods belonged to the debtor, and were not actually and *bonâ fide* in the custody of the law, when the second creditor came in, the sheriffs were bound to seize, and having neglected to do so, they are liable to this action.

HOLROYD, J., and LITTLEDALE, J., concurred.

Rule discharged.

BRAZIER *v.* JONES, Esq.

In an action against the Marshal for the escape of a prisoner committed under an attachment for not performing an award, an allegation that plaintiff and the prisoner referred their disputes to arbitration "by *mutual bonds of* submission," is a material and necessary allegation, and must be strictly proved; proof of the prisoner *only* having executed a submission bond, is insufficient, and the plaintiff must be nonsuited.

CASE, against the Marshal of the King's Bench prison, for an escape. The declaration stated that differences

being depending between plaintiff and one *Bryant*, all matters in difference between them were, by *mutual bonds of submission*, referred to certain arbitrators; that the arbitrators, by their award, ordered *Bryant* to pay to plaintiff, on the 1st of June, 1825, a certain sum of money; that *the bonds of submission* were made rules of the Court of C. P.; that *Bryant* not performing the award, plaintiff sued out a writ of attachment against him, he being then in the custody of the marshal; that *Bryant*, so being in the custody of the marshal, was, on the 26th January, 1826, taken before a judge of C. P. under a writ of *habeas corpus*, and committed to the Fleet prison, for a contempt in not performing the award; that he was, on the same day, taken before a judge of K. B. under another writ of *habeas corpus*, and re-committed to the custody of the marshal, charged with the contempt, from which custody he escaped on the 15th November, 1826, whereby plaintiff lost his debt. Plea, not guilty, and issue thereon. At the trial before Lord *Tenterden*, C. J., at the adjourned Middlesex sittings after last Trinity term (*a*), the case was this:—The action was brought for the escape of *Bryant* from the custody of the defendant on the 15th November, 1826. *Bryant* had been originally in the defendant's custody, residing within the rules of the King's Bench prison. He was taken from thence by *habeas corpus* issued out of the Court of C. P., and by that Court committed to the Fleet prison for the contempt in not performing the award, and he was again taken from thence by *habeas corpus* issued out of the Court of K. B., and by that Court re-committed to the defendant's custody, charged with the attachment from the Court of C. P. The plaintiff proved in evidence the award, the submission bond entered into by *Bryant*, (but not that entered into by himself,) the rules of court, the writ of attachment, the *habeas corpus* to bring *Bryant* up from the Court of K. B., the commitment upon the attachment to the Fleet prison, the second *habeas corpus*, and the commitment

(*a*) Counsel for the plaintiff, *Scarlett*, A. G., and *Patteson*; for the defendant, *Gurney* and *Campbell*.

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thereon to the defendant's custody, and the escape, as laid in the declaration. It was objected, on the part of the defendant, that *Bryant*'s submission bond only being proved, and not the plaintiff's, the allegation in the declaration respecting "*mutual bonds* of submission" was not supported. This objection the Lord Chief Justice overruled. It was then contended that the action must be considered as brought, not for the escape of a party in custody in execution, but upon *mesne* process, and, therefore, that the action was not maintainable at all, or, at all events, that the plaintiff would be entitled at most to nominal damages. This objection the Lord Chief Justice reserved, and directed the jury to find a verdict for the plaintiff with nominal damages. The jury found for the plaintiff, damages one farthing. The plaintiff had leave to move, upon the latter point, to increase the verdict to the full amount of his debt from *Bryant;* and the defendant had leave to move upon the first point to enter a nonsuit. In Michaelmas term last *Gurney* obtained a rule nisi accordingly, against which

Scarlett and *Patteson* now shewed cause. The question is, whether an action on the case is maintainable against the marshal, for the escape of a prisoner who was in custody by virtue of an attachment issued against him for not performing an award. One objection was that the plaintiff had alleged, but had failed to prove, that *Bryant* and himself referred their disputes to arbitration by *mutual bonds* of submission. Now that was an immaterial and unnecessary allegation, and therefore the plaintiff was not bound to prove it. If *Bryant* had been in custody upon a judgment, all that the plaintiff would have been compelled to prove would have been the judgment, and the subsequent proceedings; and so here, *Bryant* being in custody upon an attachment, all that it was necessary to prove was the attachment and the subsequent proceedings. *Ferrer* v. *Oven* (*a*) may be relied on by the other side; but that was a different case from this. There the action was brought

(*a*) *Ante*, i. 222; 7 B. & C. 427.

upon the award, and consequently proof of the submission of both the parties to the reference was clearly and indispensably necessary. [Lord *Tenterden*, C. J. There is no allegation here that the *Court* of Common Pleas ordered the attachment to issue, or that there was any adjudication upon the matter.] Nor need there be; it was proved that an attachment was granted; and the mere act of granting the attachment was, in effect, adjudicating upon the matter. [Lord *Tenterden*, C. J. If it had been the case of a judgment, the plaintiff must have both alleged and proved that the judgment was regularly obtained.] The objection, if good at all, should have been taken advantage of as a cause of demurrer. In *Bromfield* v. *Jones* (*a*) the declaration averred the judgment and award of execution against the prisoner, "and that *thereupon*," on such a day, the prisoner was committed to the custody of the marshal, and escaped; and it was held that it was unnecessary to prove that a *scire facias* had been sued out upon the judgment, because the allegation was an immaterial one. That case seems strongly in point with the present.

Gurney, with whom was *Campbell*, contrà. In order to lay the necessary foundation for the support of an action like this, it must be made to appear that the prisoner, who is alleged to have escaped, was regularly and legally in custody. Now that was not made to appear in the present case. The agreement of the parties to refer their differences to arbitration was the original foundation of the cause of *Bryant*'s imprisonment; that agreement was expressed by mutual bonds of submission, and therefore proof of the execution of the submission bonds of both was clearly necessary. (Here the Court stopped him.)

Lord TENTERDEN, C. J.—Can a plaintiff, in a case like this, be excused for not proving matters which he has alleged in his declaration, because he has proved other

(*a*) 6 D. & R. 500; 4 B. & C. 380.

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matters which he has not alleged in his declaration? The question really comes to that. I think he cannot be so excused. I take the true rule to be that he can recover only upon matters "*allegata et probata.*" Here the plaintiff alleges that *Bryant* and himself referred their disputes to arbitration, by entering into *mutual* submission *bonds* for that purpose; but he proves the execution of only one such bond. I think that allegation was a material and necessary allegation, and one that ought to have been proved as laid. Then there is no allegation here that the Court of Common Pleas ordered the attachment to issue. That an attachment from that Court did issue undoubtedly was proved, and that, it has been argued, is enough, without any allegation of the fact. I think that is not enough, and that it would be a dangerous precedent if we were to hold otherwise. Upon this point, therefore, it seems to me that the rule for entering a nonsuit ought to be made absolute.

BAYLEY, J.—It has been correctly stated that in order to maintain this action, it must be shewn that the prisoner was legally in custody, and further, that the plaintiff had legal grounds for insisting that he should have been detained in custody. Here no judgment obtained against *Bryant* at the suit of the plaintiff, or anything analogous to it, is alleged or proved. Then the plaintiff here does not prove the mutual submissions as alleged. Now they were the very foundation of the plaintiff's right to detain the person of the prisoner; for unless both parties duly submitted to the arbitration, the award made in the plaintiff's favour had no legal existence (*a*).

HOLROYD and LITTLEDALE, J.s, concurred.

Rule absolute.

(*a*) *Antram* v. *Chase*, 15 East, 209.

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RICHARD BOYDEN BURLEIGH and others, Executors and Executrix of ROBERT BURLEIGH, deceased, *v.* ELIZABETH STOTT, Administratrix of THOMAS STOTT, deceased.

A payment of interest by *A.* on the joint and several note of *A.* and *B.*, is evidence of a promise by *B.*, and takes the note out of the statute of limitations, though *B.* was a mere surety, and the payment was made without his knowledge.

THIS was an action of assumpsit on a promissory note, made by *Thomas Stott*, dated 4th March, 1818, for 600*l.*, payable generally to *Robert Burleigh*, with lawful interest; and also on the common counts. The defendant pleaded, first, the general issue, on which issue was joined; and, secondly, the statute of limitations. The plaintiffs replied a writ, issued on 3d October, 1826, by them, as executors, against the defendant, as administratrix. The rejoinder admitted the writ, but alleged that the causes of action did not accrue within six years of the issuing of the same; whereupon issue was joined. At the trial before Lord *Tenterden*, C. J., at the London adjourned sittings after Trinity term, 1827, a verdict was found for the plaintiffs, for 625*l.*, subject to the opinion of the Court upon the following case:—

On the 4th March, 1818, *Thomas Burleigh* and *Thomas Stott* signed the promissory note in question, which was in the following form:—

"£600. London, 4th March, 1818.

"On demand we jointly and severally promise to pay Mr. *Robert Burleigh* the sum of six hundred pounds, with lawful interest thereon.

Thomas Burleigh.
Thomas Stott."

"Witness, *J. H. Harper.*"

The note was given by *Thomas Burleigh* to *Robert Burleigh* for money lent; *Thomas Stott* was merely a surety. On the 10th October, 1818, *Thomas Burleigh* paid to *Robert Burleigh* the interest then due on the note, and the following indorsement was thereupon made upon the same by *Robert Burleigh*:—"Received the interest on this note to the 10th October, 1818. *R. Burleigh.*" On the 10th

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October, 1820, *Thomas Burleigh* paid to *Robert Burleigh* the interest then due on the note, and 100*l.* on account of the principal, and thereupon the following indorsement was at the same time made upon the note by *Robert Burleigh*: "Received the interest on this note to the 10th October, 1820; also 100*l.* on account of the principal, leaving due 500*l.*—*R. Burleigh.*" From his signing the note till his death *Thomas Stott* had no communication with *Thomas Burleigh* about the note. *Robert Burleigh* always applied to *Thomas Burleigh* for money. The payments on the 10th October, 1818, and 10th October, 1820, were made by *Thomas Burleigh* without any communication with *Thomas Stott*. *Thomas Stott* died on the 3d March, 1821, and *Robert Burleigh* died on the 8th July in the same year. The writ of *latitat* in this cause was duly issued on the 3d October, 1826. The question for the opinion of the Court is, whether the plaintiffs were, under these circumstances, entitled to recover. If they were, the verdict is to stand. If not, a nonsuit is to be entered.

Chitty for the plaintiffs.—All the parties were living at the time when the last payment was made, and *T. Stott* had no communication with *T. Burleigh* about the note, from the time of his signing it to the time of his death. It is clear, therefore, that *T. Stott* never paid any money on account of the note. *T. Stott* was merely a surety, but there is nothing in that circumstance, because it has been decided that one of two drawers of a joint note, who is surety for the other to the amount, is not discharged by the holder not having demanded payment from the surety when due, nor till after having entered into a deed of composition with the principal and his other creditors, and received the composition money. *Perfect* v. *Musgrave* (*a*). An admission made by one of two partners, after the dissolution of the partnership, concerning joint contracts during the partnership, is competent evidence to charge the other

(*a*) 6 Price, 111.

partner. *Wood* v. *Braddick* (*a*). *Whitcomb* v. *Whiting* (*b*) is precisely this case; for it was there held, that the acknowledgment of one of several drawers of a joint and several promissory note, takes it out of the statute of limitations as against the others, and may be given in evidence in a separate action against any of the others: and the same was decided in *Perham* v. *Raynal* (*c*), where all the cases on the subject were reviewed, with respect to a joint note, though one of the makers had never made any acknowledgment, and had signed the note as a surety only. Even an indorsement on a bill or note by the holder, of the payment of interest within six years, may be given in evidence to prevent the operation of the statute of limitations, if it were *bonâ fide* made when the six years had not elapsed. *Searle* v. *Lord Barrington* (*d*).

E. Alderson, contrà. The death of one of the makers of this note has put an end to it as a joint note; and it must now be regarded as the separate note of the defendant. Considering the note in that character, there is no acknowledgment to take the case out of the statute of limitations. The plaintiffs have themselves treated the note as a separate note, by suing the executor of one of the makers only. *Whitcomb* v. *Whiting* has been often impugned, and cannot be considered as an authority, to the extent to which it is wished to carry it. *Perham* v. *Raynal* seems to have proceeded upon the erroneous notion that after six years payment is to be presumed. *Pittam* v. *Foster* (*e*) is in favour of the present defendant. That was an action upon a joint note made by *A.* and *B.*, while *B.* was sole, against *A.*, *B.*, and *C.* the husband of the latter: and it was held, that an acknowledgment by *A.* within six years, that the debt was due, would not take the case out of the statute of limita-

(*a*) 1 Taunt. 104.
(*b*) Dougl. 652.
(*c*) 2 Bingh. 306.
(*d*) 2 Stra. 826; 2 Ves. sen. 43, 54. And see *Rose* v. *Bryant*, 2 Campb. 321, and the note in Mann. N. P. Digest, 2d ed. 130.
(*e*) 2 D. & R. 363; 1 B. & C. 248.

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tions, *B.* and *C.* being married at the time the acknowledgment was made. The principle on which that case proceeded applies to this, namely, that it is contrary to the policy of the law to allow one man to make a promise which shall be binding on another. *Tanner* v. *Smart* (*a*) decided that an acknowledgment of a debt is not enough to bar the statute, unless it be such as amounts to evidence of a promise to pay.

Chitty in reply. *Pittam* v. *Foster* has no bearing upon the present case, because at the time when the acknowledgment relied upon as binding all the parties and taking the case out of the statute was made, one of those parties had become a married woman, and therefore incapable of making any acknowledgment or promise binding upon herself. In *Tanner* v. *Smart* the facts were exceedingly different from the facts in the present case. *Whitcomb* v. *Whiting* has never been overruled; and if that is law, which it is submitted it is, it decides the present case. The note continues to be that which it was originally made, a joint and separate note, and the indorsement on it is evidence that 500*l.* is still due upon it.

Lord TENTERDEN, C. J.—The late cases upon this subject have proceeded upon sounder and more equitable principles than seem to distinguish earlier decisions. It is now settled that a mere acknowledgment of the subsistence of the debt, unless coupled with, or amounting to evidence of, a promise to pay, is not sufficient to take a case out of the operation of the statute of limitations. In this case, as it seems to me, there is sufficient evidence of a promise to pay by both the parties to the note, jointly and severally. By one of them there was an actual payment within six years of the action being brought. With respect to him, therefore, if he had been living, and sued, the statute would clearly have been waved. Then, if the note had been joint only,

(*a*) 6 B. & C. 603.

that payment by the one, would, unquestionably, have bound the other maker. This, however, is a joint and separate note, and the question is, whether that circumstance varies the effect which a payment by one would otherwise have on the other maker. One of the makers is dead; the payee, therefore, is compelled to sue upon the note as the separate note of the survivor. Upon the whole, under these circumstances, I think it most just to hold, that as in the case of a joint note, a payment by one maker within six years would operate as a promise to pay by the other maker, so in the case of a joint and separate note, payment by one maker, within six years, shall operate as a promise to pay by the other. I am, therefore, of opinion, that the plaintiffs are entitled to judgment.

BAYLEY, J.—I am of the same opinion. I think that a payment, made by one of two makers of a joint and separate note, is quite sufficient to raise an implied joint and separate promise by both to pay the amount due on the note.

HOLROYD, J.—I also am of the same opinion. There can be no doubt that, regarding the note as joint only, the payment by one took the note out of the operation of the statute as regards both the makers. I think, in justice and sense, the same result ought to follow, regarding the note as both joint and separate. The debt was, in reality, originally a joint debt, and though each debtor became separately, he was still jointly, liable, and a payment by one released *pro tanto* both the joint and separate liability of each. The one receives the benefit of a payment by the other, the same whether the liability be joint only, or both joint and separate: in fairness, therefore, he ought to incur the same responsibility in both cases. In the case of a joint and several bond, a release by the obligee to one

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obligor would clearly destroy the joint and several obligation (*a*).

LITTLEDALE, J., was absent.

Judgment for the plaintiff (*b*).

(*a*) Vide 2 Rol. Abr. 412, pl. 4 & 5; 18 Vin. Abr. 352; *Clayton* v. *Kynaston*, 2 Salk. 574; Co. Litt. 232 a; Ibid. note, 171; 2 Tho. Co. Litt. 111.

(*b*) If the obligee in a joint and several bond make one of two obligors his executor, with others, the action on the bond is discharged as to both obligors. *Cheetham* v. *Ward*, 1 Bos. & Pul. 630. But if the obligee of a bond covenant not to sue one of two joint and several obligors, and that if he do, the deed of covenant may be pleaded in bar, he may still sue the other obligor. *Dean* v. *Newhall*, 8 T. R. 168; *Hutton* v. *Eyre*, 6 Taunt. 289; 1 Marsh. 606.

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The 11 *Geo.* 3, c 29, which renders "substantial inhabitants" of the wards of London eligible to the office of collector of the ward rates, applies to *resident* inhabitants *only*.

THIS was an action of debt to recover a penalty of 50*l.*, imposed by the statute 11 *Geo.* 3, c. 29, from the defendant, alleged to be a substantial inhabitant of the ward of Coleman-street, for not taking the oath required by the statute as collector for the ward of a rate for paving, cleansing, and lighting the streets, and making and enlarging the common sewers, within the city of London, for the year ending 21st December, 1825. The declaration contained a count for refusing to take the office. The defendant pleaded not guilty. At the trial before Lord *Tenterden*, C. J., at the London adjourned sittings after Trinity term 1826 (*a*), the plaintiff obtained a verdict for one penalty of 50*l.*, subject to the opinion of the Court upon the following case:—

By the statute 11 *Geo.* 3, c. 29, entitled "an act for consolidating, extending, and rendering more effectual the powers granted by several acts of parliament for making,

(*a*) Counsel for the plaintiff, *Gurney* and *Parke*; for the defendant, *Scarlett* and *Law*.

enlarging, amending, and cleansing the vaults, drains and sewers within the city of London and liberties thereof, and for paving, cleansing, and lighting the streets, lanes, squares, yards, courts, alleys, passages, and places, and preventing and removing obstructions and annoyances within the same," it was enacted, "that for the defraying the expense of paving, &c. the said streets, &c., and preventing annoyances therein, and of making, &c. any of the common sewers, &c. within the said city, one or more rates or assessments should, when the commissioners appointed by that act should think fit to order and direct, be made, laid, and assessed in the several wards of the said city, by the aldermen, or their deputies respectively, and the major part of the common-councilmen of each ward, upon all and every person and persons who did or should inhabit, hold, occupy, possess, or enjoy, any land, house, shop, warehouse, cellar, vault, or other tenement or hereditament within the said several wards, and who, by the laws then in being, were or should be liable to be rated towards the relief of the poor in the respective parishes where he, she, or they should respectively live or reside, for raising such competent sum as the said commissioners should judge needful and direct, so as such rates or assessments did not in any one year exceed certain sums in the pound of the yearly rents; such rates to be ascertained by the rates at which such respective lands, &c., should be, from time to time, assessed to the land-tax."

It was also enacted, "that it should be lawful for the alderman, or his deputy, with the major part of the common-councilmen of each ward, at the court of wardmote to be holden upon or near the feast day of St. *Thomas* the Apostle, for the choice of ward officers, to return to the said wardmote the names and places of abode of a competent number of substantial inhabitants of such ward, of whom so many as the said alderman, or his deputy, and the major part of the said common-councilmen, should think fit and direct, not exceeding half the number of persons so re-

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turned, should be chosen and appointed at the said wardmote to be collectors of the said rates and assessments for one whole year, from the said feast day of St. *Thomas* the Apostle, to the same feast day then next following, and so yearly and from year to year."

It was also provided, "that every such collector who should be so chosen, should, at the wardmote at which he should be chosen as aforesaid, or within the space of twenty days then next ensuing, before the alderman of the said ward for which he should be so chosen collector, or his deputy, take and subscribe an oath in the said act mentioned, or being one of the people called Quakers make and subscribe an affirmation, for the true and faithful execution of the said office, which oath or affirmation should be administered by the alderman of each respective ward; and if any collector chosen in pursuance of the act should refuse or neglect to take the said oath, or being one of the persons called Quakers to make the said affirmation, or to take upon himself the said office, or having taken upon himself the said office, should refuse or neglect to serve or execute the same, according to the true intent and meaning of the act, he should, for every such refusal or neglect, forfeit and pay the sum of 50*l.*"

There was also a proviso that nothing in the act should extend to oblige persons to serve the office, who, by the laws then in being, were exempted from serving any ward office.

The rate imposed by this statute is commonly called the consolidated rate.

By the statute 4 *Geo.* 4, the said penalty is made recoverable by action of debt in any of his Majesty's courts of record, in the name of any one of the clerks to the said commissioners, and is made applicable to the purposes of the acts relating to this subject.

The plaintiff, at the time of the commencement of this action, was one of such clerks. The defendant was, at the wardmote court of the ward of Coleman-street, held on

St. *Thomas*'s day, 1824, chosen and appointed in the manner required by the act, collector of the consolidated rate for the said ward, for the year ending on St. *Thomas*'s day, 1825, having been duly nominated according to the act, and a rate having been duly made for that year; and he refused to take the oath required by the act (not being a Quaker) or to take upon himself the office. The ground of his objection was, that he was not an inhabitant of the ward, within the meaning of the act. He was in other respects liable to serve the office. The defendant was and is a carpenter and builder, carrying on an extensive business, in partnership with his brother Mr. *George Martyr*, and at the time of the defendant's being chosen to the office in question he was also in partnership with Mrs. *Elizabeth Martyr*, his mother. The defendant's only dwelling-house is at Greenwich, in Kent, where he, with his family, resides. Mrs. *E. Martyr* and Mr. *G. Martyr* also reside at Greenwich, having separate houses there. The business of the defendant and his partner is principally carried on at a very large yard and premises in Greenwich, but for the convenience of business they have workshops in several parts of London, as, for instance, one at Cotton Garden, and another at the Treasury. They likewise occupy premises, consisting of a counting-house and workshop, in Lothbury, in the ward of Coleman-street, London, being the ground-floor of Founders' Hall, which premises the defendant and his partner, and, previously to them, the defendant's father, who was in the same business, have occupied for the last thirty years or thereabouts. For upwards of fifty years past no part of these premises has been used as a dwelling-house, and from the period the defendant's father took the premises up to the present time, they have been used as a counting-house and workshop only. There is no bedroom on the premises, and neither the defendant, nor his partner, nor any of their workmen or servants, ever sleep, nor are any victuals ever cooked, upon the premises; and at night, after the workmen have left, the premises are locked

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up. The defendant was and is rated for the said premises called Founders' Hall to the ward rates, and, among others, to the said consolidated rate, and to the parish rates. Neither the defendant nor his partner, nor the defendant's father, were ever, till the present occasion, called upon to serve the office in question, or any parish office, in respect of such their occupancy of the premises in question, and the defendant is an inhabitant of Greenwich, and liable to serve all parish offices there, and has for many years served as one of the governors of the poor there.

The question for the opinion of the Court is, whether the defendant was a substantial inhabitant of the said ward, within the meaning of the act of parliament. If the Court shall be of opinion that he was, the verdict for the plaintiff is to stand; otherwise a nonsuit is to be entered.

Parke, for the plaintiff. The defendant was a substantial inhabitant of the ward, within the meaning of the act of parliament, and is therefore liable to this action for not serving the office to which he was elected. *Rex* v. *Poynder* (*a*), seems decisive of the present case. It was there held, that a person occupying a house in one parish by means of a clerk only, and paying rent, rates, and taxes, but sleeping in another parish, was a substantial householder, within the meaning of the 43 *Eliz.* c. 2, and liable to serve the office of overseer of the poor in the first-mentioned parish. That case is very analogous to the present in all its particulars; in the facts found; in the language of the act of parliament; and in the nature of the office. *Inhabitant*, for the purposes of this act, must mean, as it has been held that it does for many other purposes and in many other instances, *householder*, or *occupier*. In *Rex* v. *Adlard* (*b*), *Abbott*, C. J., said, "the facts stated raise the question whether the occupier of a tenement, situate within a parish, but not used as a dwelling-house, is an inhabitant, and as

(*a*) 2 D. & R. 258; 1 B. & C. 178; 1 D. & R. M. C. 247.

(*b*) 7 D. & R. 340; 4 B. & C. 772; 3 D. & R. M. C. 416.

such liable to serve this office (of constable). It has been contended, that such an occupier is an inhabitant of the parish within which the tenement is situate; *and for many purposes he certainly is.*" It was there held that such an occupier was not an inhabitant, so as to be liable to serve the office of constable, *because* that office, from its nature, requires personal residence and presence in the parish. On the other hand, one of the grounds on which the defendant in *Rex* v. *Poynder* was held to be liable to serve the office of overseer, seems to have been that personal residence was not necessary in that case. Therefore both those cases upon that point apply to the present, for it is impossible to say that constant personal residence is necessary for the due discharge of the duties of the office of collector of a rate like this, as it is in the case of a constable, or even of an overseer. *Rex* v. *Tunstead* (*a*) is also in point. It is enacted by 20 *Geo.* 3, c. 36, relative to the binding of poor apprentices within particular incorporated districts, that no person shall be bound to receive any such apprentice, unless he be an *inhabitant and occupier* in the parish where such child lives. Yet it was held in that case, that it was not necessary that the master should *reside* in the parish, but that if he be an occupier there it is sufficient; for *inhabitant* and *occupier* are for this purpose synonymous terms. So here, the word *inhabitant*, in this act of parliament, does not mean *resident*, it is synonymous with *occupier* or *householder*, and comprehends a person in the situation of the defendant.

Law, contrà. The defendant is not a substantial inhabitant of the ward, within the meaning of the act of parliament. It was observed by *Bayley*, J., in *Rex* v. *Hall* (*b*), that "the true meaning of particular words in acts of parliament is to be found, not so much in a strict etymological

(*a*) 3 T. R. 523. See *Rex* v. *Clapp*, 3 T. R. 107; *Rex* v. *Barwick*, 7 T. R. 33.

(*b*) 2 D. & R. 241; 1 B. & C. 123; 1 D. & R. M. C. 232.

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propriety of language, nor in popular usage, as in the subject-matter of the occasion on which they are used, in connection with the object which is sought to be attained. The meaning of the word *inhabitants*, in the statute of Bridges (*a*), affords an illustration. That statute speaks of the inhabitants of any county, &c. Taking that word either in its strict or its popular sense, it is there applied to those persons only "who have a dwelling therein," and all persons who have a dwelling therein are there spoken of as "inhabitants thereof." But the object of that statute being to raise a fund for the repairs of the bridges in the county, by the taxation of persons in reasonable proportions to their property therein, the word *inhabitant* has there been held to include all the *occupiers* of land in the county, although not actually *dwelling* in the county." Now, trying this case by that test, it is clear that the defendant is not liable, as an inhabitant, to serve the office in question, because the object of the clause regulating the election of the collectors is plainly to include *resident* inhabitants only, in contradistinction to other clauses, the object of which as plainly is to include all sorts of inhabitants, that is, occupiers and householders, whether resident or not. One instance will be sufficient to make this clear. The clause which imposes the consolidation rate, imposes it on "all persons who inhabit, hold, occupy, possess, or enjoy any land, house, shop, warehouse, cellar, vault, or other tenement or hereditament, within any of the wards:" an enumeration which comprises every possible species of inhabitant, as it naturally would do, the object being to extend the rate over as many persons as possible. But in the clause which regulates the election of the collectors, where there is no such object, but, on the contrary, a very different object, namely, to be careful in the selection of proper persons to fill the office, the words are studiously varied, and bear a decidedly different import; for that directs a return of "the names and *places of abode* of a

(*a*) 22 *Hen.* 8, c. 5.

competent number of *substantial inhabitants* of the ward," of whom so many as the alderman, &c. shall think fit are to be chosen collectors of the rates. Now the provision for the return of the places of abode of the parties shews conclusively that substantial inhabitants of the ward means persons actually dwelling and residing within the ward, and not persons merely occupying premises there like the defendant, because the places of abode mentioned must mean places of abode within the ward, and not elsewhere. There is every reason why this office should be served only by persons actually resident within the ward; and the observations of the Lord Chief Justice upon that subject in *Rex* v. *Adlard* (*a*) are strictly applicable to this case. He says, "for the purpose of assessment, it is perfectly immaterial whether the occupier is a resident within the parish or not; consequently, for such a purpose a non-resident occupier may fairly enough be deemed an inhabitant, where that word happens to be the only mode of description applied to the individuals who are to bear the burthen. The office of constable is of a very different character. It is a personal, not a pecuniary office, and must be performed by personal attendance within the parish." *Rex* v. *Hall*, where *householder*, and *Rex* v. *Poynder*, where *substantial householder*, were held not to mean *residents*, were very different cases from the present; and the latter turned upon the language of the 43 *Eliz.* c. 2, which contains both the words, *inhabitant* and *occupier;* and *Bayley*, J., said, in *Rex* v. *North Currey* (*b*), that he thought, upon the authority of decided cases, that the word *inhabitants* in that statute must be construed to mean *residents* only.

Lord TENTERDEN, C. J.—I am of opinion that upon the true construction of this act of parliament the defendant is not liable to serve the office to which he has been elected. I think he is not a "substantial inhabitant" of the ward within the fair meaning of the clause regulating

(*a*) 7 D. & R. 340; 4 B. & C. 772; 3 D. & R. M. C. 416.

(*b*) 7 D. & R. 424; 4 B. & C. 953; 3 D. & R. M. C. 451.

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the election of the collectors, and that the former clause imposing the rates leads conclusively to that opinion. The evident object of that former clause was, that every person who possessed any property within the ward should contribute to the rate in proportion to the value of that property, whether he resided upon it or not; and accordingly words are used sufficiently comprehensive to include every person, resident or non-resident, who had any property in the ward. When we come to the clause in question we find a different object in view, namely, to select from the inhabitants of the ward a limited number of persons fit for the office of collectors of the rate; and accordingly very different words are there used, for a return is directed of the names and places of abode of a competent number of substantial inhabitants of the ward. I think the places of abode there mentioned must mean places of abode within the ward, and when I contrast the phrase "a competent number of substantial inhabitants of the ward," with the phrase "all persons who inhabit, hold, occupy, possess, or enjoy any land, &c. within the ward," I cannot help concluding that the intention of the legislature in passing two clauses so differently worded was to give effect to a different object, namely, by the one to comprehend all persons having property within the ward, and by the other to comprehend resident inhabitants only. I form my opinion in this case, not so much upon general principles as upon the peculiar phraseology of the act of parliament, upon the true construction of which I think the defendant is not within its operation.

BAYLEY, J.—I am of the same opinion. The difference pointed out between the two sections is very important, and is, I think, decisive to shew that a mere occupier like the defendant was not intended to be described by the terms substantial inhabitant. There are some cases in which the word inhabitant must be taken to mean residents only; there are others, in which it may fairly be construed

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to extend to mere occupiers, non-residents. In this case, I think, it is necessarily confined to residents, because the office in question is one of a personal nature, and requiring personal attendance in the ward. To compel a non-resident, a mere occupier like the defendant, to serve this office, would produce evil consequences in two respects; it would make the burthen of the office much more severe upon the officer, and it would throw great inconvenience on the inhabitants; for if they were absent from home upon his first application for the rate, they might have to send to Greenwich, the place of his actual residence, to pay it.

The other Judges concurred.

Judgment for the defendant (*a*).

(*a*) And see *Rex* v. *G. W. Hall*, 1 B. & C. 123; *Rex* v. *Poynder*, *ib.* 178, 2 D. & R. 178; *Rex* v. *J. Adlard*, 7 D. & R. 340, 4 B. & C. 772.

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An act of parliament imposed wharfage on goods "*landed* or discharged upon" wharfs at Hull, the amount to be the same as that charged upon goods "*loaded* or discharged upon" wharfs in the port of London:—Held, that wharfage was payable only on goods landed on the wharfs, and not on goods shipped from off them.

INDEBITATUS assumpsit for wharfage dues, with the ordinary money counts. Plea, non assumpsit, and issue thereon. At the trial before *Bayley*, J., at the York assizes, the plaintiffs obtained a verdict, damages 7*l.* 5*s.* 3*d.* subject to the opinion of the Court upon the following case:—

The plaintiffs were the Dock Company at Hull, incorporated under an act of parliament of 14 *Geo.* 3. They were owners of several wharfs and warehouses, situate on the side of the docks, erected pursuant to that and a subsequent act of 42 *Geo.* 3. The claim made by the Company was for 7*l.* 5*s.* 3*d.*, the amount of wharfage due on goods loaded by the defendant, a merchant at Hull, on board of certain vessels *from* their wharfs. It was admitted by the

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defendant that the goods were so loaded, and that 7*l.* 5*s.* 3*d.* if in law chargeable, was the proper amount according to the rate usually charged in the port of London. It was admitted by the plaintiffs that the goods had been previously loaded *on* their wharfs, and had paid wharfage for such loading; and that, after such payment, part of them had been removed to the premises of the defendant, and other part to the premises of *other* persons, where they had respectively remained for some time previous to their being again brought to the plaintiffs' wharfs to be loaded as before mentioned.

Sect. 45 of 14 *Geo.* 3, provided, "that all goods, &c. which shall be *landed or discharged upon* any of the quays or wharfs which shall be erected by virtue of this act, shall be liable to pay, and shall be charged and chargeable with, the like rates of wharfage and payments as are usually taken or received for any goods, &c. *loaded or discharged upon* any quays or wharfs in the port of London, and shall be paid to the respective Company and owners of the said quays or wharfs, so to be erected as aforesaid, in like manner as the rates and duties established by this act are hereby directed to be paid."

The previous sect., 42, provided, "that in consideration of the great charges and expenses which the making, &c. such basin or dock, quay or wharf, reservoirs, sluices, bridges, roads and works, and the supporting, &c. the same in future, will amount to, there shall be payable and paid, from and after, &c. to the said Company, or to their collectors or deputies, for their use, for every ship or vessel, (the king's ships of war, and other ships or vessels employed in his majesty's service only, excepted,) coming into or going out of the said harbour, basin or docks, within the port of Hull, or *unlading or putting on shore*, or *lading or taking on board* any of their cargo, or any goods, &c. within the said port, by the master or commander, owner or owners of every such ship or vessel, the several rates or duties of tonnage (according to the full of the reach and

burthen) hereafter particularly rated and described; which rates or duties shall be, and are hereby vested in the said Company, as their own proper monies, and to and for their own proper use and behoof, for the purposes aforesaid, and shall be paid at the time of such ships' or vessels' *entry inwards*, or *clearance or discharge outwards*, or in case any ships or vessels shall not enter as aforesaid, then at any time before such ships or vessels shall proceed *from the said port*, at the custom-house in the said port; so as no ship or vessel shall be subject or liable to the payment of the said rates or duties, or any of them, *more than once for the same voyage*, both out and home, notwithstanding such ship or vessel may go out and return with a loading of goods or merchandize."

The 42 *Geo.* 3, which authorized the making of a new basin, provided, "that all goods, &c. which shall be *landed or discharged on* any of the wharfs which shall be made and built on the east and west sides, or north and south ends of the basin or dock, and entrance, hereby directed to be made, shall be liable to pay, and shall be charged and chargeable with the like rates of wharfage and payments to the said Company, as are or may be taken or received by them for any goods, &c. *loaded or discharged upon* the quays or wharfs of the basin or dock made in pursuance of the said recited act; and the said Company shall have and be entitled to the like powers and remedies for the recovery thereof as are given by the said recited act for the recovery of the rates and duties thereby granted."

Besides the quays or wharfs erected by the Company, under the 14 *Geo.* 3, there were also in the town and port of Hull other quays or wharfs, the property of different individuals, which were erected pursuant to certain provisions in sect. 3 of that act. That section, after reciting "that whereas there are certain staiths situate on the west side of the river Hull, between *Thomas Watton*'s ship-yard and a certain staith called Rotten Herring Staith, at which staiths the proprietors thereof have from time immemorial

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landed and discharged, laden and shipped, goods, &c.; and whereas it is reasonable that this privilege should be continued to the proprietors of the said staiths," provides, "that when and as soon as the basin or dock, hereinafter mentioned and directed to be made, shall be fit for the reception of loaded ships, and not sooner, it shall be lawful for all and every the proprietors of the said staiths to build and make, at their own expense and charge, commodious quays or wharfs opposite to their said staiths respectively, to be erected upon piles of wood, and not otherwise, and to project into the haven of the said river Hull fifteen feet, to be open at all times to the officers of his majesty's revenue, by a free and clear communication with the common staith adjoining; on which quays or wharfs, when so made and erected, it shall be lawful to *ship off, land and discharge*, all goods called sufferance goods, and all other goods whatever, which are permitted to be *shipped off or landed* in the port of London as sufferance goods, and under the like regulations."

By an Order in Council, dated 23rd July, 1800, after reciting the act for rebuilding the city of London, and its provisions relative to wharfage rates on the quays there, which by that act were to be settled by an order in council, and that proper provisions for that purpose had not been made, and that a certain table of rates had been prepared, it is thus stated:—"His majesty this day took the said table of rates for wharfage and cranage into his royal consideration, and hath assessed and allowed, &c. and doth hereby, &c. the said several and respective rates for wharfage and cranage contained in the said table; and doth order and appoint that such rates respectively, and no other, shall and may be taken for the wharfage and cranage of all such goods, &c. respectively, as are in the said table mentioned, which shall at any time hereafter, by any person whatsoever, be *brought unto, shipped off, loaden or unloaden, at or from* any wharf or wharfs within the city of London or the liberties thereof; and that it shall and may be lawful for the

present owner or owners, proprietor or proprietors of the said wharfs, and his or their heirs, &c. from time to time, and at all times hereafter, to demand of and receive from every person who shall hereafter *bring unto, ship from, or load and unload at* the aforesaid quays or wharfs respectively any such goods, &c. respectively, the several rates for cranage and wharfage, which by the aforesaid table are assessed and appointed to be paid for the same, and no other."

The question for the opinion of the Court was, whether the plaintiffs, under the above circumstances, were entitled to charge wharfage for loading goods *from* their wharfs: if so, the verdict to stand; if not so, a nonsuit to be entered.

Alderson for the plaintiffs. There are two questions in this case. First, is the language of the act of parliament ambiguous with respect to the right to wharfage which it confers upon the plaintiffs? and, secondly, even if it is, does that ambiguity operate so as to restrain their general right to the wharfage? If the plaintiffs are entitled by the common law to that which they claim, it is for the defendant to shew that their common law title is restrained or narrowed by the act of parliament. If, on the other hand, the title of the plaintiffs originates in the act of parliament, it is for them to make out that title clearly and satisfactorily. There are two recent cases of *Waterhouse* v. *Keen* (*a*), and *Denn* v. *Diamond* (*b*), in which this principle has been strongly enforced. In the first the question arose upon the liability of the public to pay certain tolls, which were entirely created by an act of parliament, by virtue of which alone they were demandable; and *Bayley*, J., there said, "this act of parliament, like all others of the like nature, must, if possible, be construed with reference to the particular words adopted in it; but if those words have an equivocal import, and the meaning of the act thereby be-

(*a*) 6 D & R. 257; 4 B. & C. 200; 3 D. & R. M. C. 190.

(*b*) 6 D. & R. 328; 4 B. & C. 243.

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comes doubtful, then it must be construed according to the well known, just and established rule of law; namely, most strongly in favour of the public, upon whom it tends to impose a burthen." The latter case was a question upon a stamp act, where the same learned Judge observed, "it is a well settled, and I think a beneficial rule, that in all cases in which the subject is to be charged with a tax, the language of the legislature should be clear, plain, and unambiguous." It is not intended, nor is it necessary, at all to impugn the principle thus laid down; it is enough to say that those cases are so distinguishable from the present in their circumstances, that they can have no bearing upon it. In both those cases the assessment imposed upon the public originated entirely from an act of parliament. Not so in the present case. Here the plaintiffs are the owners of the soil on which the wharfs, in respect of which these payments are claimed, are made; consequently they possess all the rights appertaining to the ownership of the soil, independently of any act of parliament. [Lord *Tenterden*, C. J. If they are entitled to claim wharfage, as owners of the soil, independently of the act of parliament, they may charge whatever sum they please, without being bound by the limitations there contained.] It seems clear that they have such a right. Lord *Hale*, in his treatise *De Portibus Maris*, p. 76, says this:—"There is a second interest considerable, viz.—the interest of the shore adjacent to the port. Though it is true it is rare to find any port, but that the king or the owner of the port in point of franchise hath such a convenient portion of the shore and land adjacent, where wharfs, and quays, and warehouses may be built, for the lading and unlading, and safeguard of merchandizes; yet the interests are and may be divided, however they are several in their nature; and the duties that arise by reason of the goods when unladen and laid on shore, or in relation thereunto, are different from those that have been before spoken of. And many times it falls out, that such a place within a port may be of great con-

veniency to make a common quay or wharf where the propriety of the soil may belong to a subject, whereby either his interest must be bought in by the lord of the port, or he must have those benefits that may arise by the taking or landing of merchandize." He then enumerates "the rights that happen by reason of this interest in the shore," among which are "*cranage*, or duty for the taking up or lading on a ship any goods or merchandize by that engine; *wharfage*, a toll or duty for the pitching or lodging of goods upon a wharf;" clearly comprehending goods exported as well as imported. He then proceeds to describe the title by which these rights may accrue, which, he says, is of three kinds; first, convention, or agreement; secondly, prescription, or custom; thirdly, charter, or grant. Then, speaking of those by convention or agreement, he says this:—"A man for his own private advantage may in a port town set up a *wharf or crane*, and may take what rates he and his customers can agree for *cranage*, *wharfage*, &c.; for he doth no more than is lawful for any man to do, viz. makes the most of his own. And such are coal wharfs, and wood wharfs, and timber wharfs, in the port of London, and some other ports. But such ports cannot receive customable goods against the provision of the statute of 1 *Eliz.* c. 11. If the king or subject have a public wharf, unto which all persons that come to that wharf must come and *unlade or lade* their goods as for the purpose, because they are the wharfs only licensed by the queen, according to the statute of 1 *Eliz.* c. 11, or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for *cranage*, *wharfage*, &c.; neither can it be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the *wharf and crane*, and other conveniences, are affected with a public interest, and they cease to be *juris privati* only: as if a man set out a street in new buildings

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on his own land, it is now no longer bare private interest, but it is affected with a public interest. But in that case the king may limit by his charter, and license him to take reasonable tolls, though it be a new port or wharf, and made public; because he is to be at the charge to maintain and repair it, and find those conveniences that are fit for it, as cranes and weights." The distinction, therefore, between the charges claimable in respect of public and private wharfs, seems to be, that in the case of a public wharf the charges must be reasonable, that is, what the law will deem reasonable, and that in the case of a private wharf the amount of the charges is to be altogether a matter of agreement and arrangement between the proprietor and his customers. Then, the common law right of the Company being clear, their statutable right remains to be considered, and though the language of the legislature may be in some instances obscure, still looking at the acts of parliament altogether, the intention to allow wharfage on goods exported as well as imported, is apparent. The statute regulating the rates of wharfage in the port of London gives wharfage upon "all goods brought unto, shipped off, loaden or unloaden, at or from any wharf." The statute regulating the rates of wharfage in the port of Hull puts the wharfage to be there taken on the same footing with the wharfage to be taken in the port of London; only restraining the Hull Dock Company from charging, under any circumstances, more than is allowed to be charged in London. Unless this construction is adopted, this absurdity will follow, that if goods, to whatever amount, are exported from the docks in the first instance, the Company will be precluded from charging any wharfage at all upon them; which surely never could have been intended. The phrase "discharged" in the Hull Act is equivalent to "shipped off" in the London Act, they both mean goods put on board ships from the wharf, or goods exported. So it is clear that the word "landed" in the 14 *Geo.* 3, is a mistake for, or means the same as "loaded" in the 42 *Geo.* 3, that is, loaded from ships upon the wharf,

or goods imported. This simple construction renders the whole matter plain and intelligible, and it is clearly the correct one, for the 42 *Geo.* 3, when reciting and alluding to the 14 *Geo.* 3, quotes it as speaking of goods "loaded or discharged."

Parke, contrà. The act of parliament imposing this tax for wharfage on the public is equivocal in its language, and doubtful in its meaning; it is therefore to be construed most in favour of the public. This rule has been lately acted upon by this Court, in the cases cited on the other side, which, as far as this principle is concerned, are not distinguishable from the present case. Then, any bargain or arrangement made between the Company and the public, being founded upon the act of parliament, must receive the same construction. It is impossible upon any view of this case to say, that an intention to charge with a second wharfage goods loaded outwards from the wharf, and which have once paid wharfage when loaded inwards on the wharf, is clearly and unequivocally expressed; and not being expressed, an intention so unjust can never be implied. But the clause which imposes the wharfage, s. 45 of the 14 *Geo.* 3, does express its object and meaning in clear and unequivocal language; for the goods there charged are "goods *loaded or discharged upon* any of the wharfs to be erected by virtue of that act;" and they are to be charged the same as "goods *loaded or discharged upon* any wharfs in the port of London." Now there is no ambiguity in that enactment; it clearly applies exclusively to goods landed inwards from vessels upon the wharfs, in which character the goods in question have, it is admitted, already paid wharfage. When the other clauses of this act come to be examined, much ambiguity and obscurity, it must be confessed, arise, because the various phrases of "unloading or putting on shore"—"lading or taking on board"—"entry of vessels inwards"—and "clearance or discharge of vessels outwards," are to be found. So, the subsequent act of

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43 *Geo.* 3, again introduces doubt and difficulty, for it recites the former act; and in speaking of the imposing clause, s. 45 of 14 *Geo.* 3, says, that goods "*landed* or discharged on" any of the new wharfs then intended to be built shall be charged the same as "goods *loaded* or discharged upon the wharfs, &c. made in pursuance of the said recited act." Then, it is said, "loaded or discharged" means loaded into ships from the wharf, or discharged from ships upon the wharf, and therefore the double wharfage is there imposed. But "the said recited act" is there *mis*-recited, for its language is not *loaded* or discharged, but *landed* or discharged, both which latter words clearly apply only to goods removed out of a ship and deposited upon a wharf: and a misrecital of a previous act of parliament in a more recent one cannot have the effect of repealing or altering the plain provisions of such previous act. *Dore* v. *Gray* (*a*), where *Ashhurst, J.*, said (*b*), "this appears to be a case within the words of the statute 23 *H.* 8. And as it is stated in the case, that the works of the commissioners of sewers are beneficial to all the lands on this level, and to the plaintiff in particular, we ought not to narrow the construction of the statute. Neither should we permit the operation of that statute to be restrained by the recital of the statute 3 *Jac.* 1; for the bare recital in a statute is not sufficient to repeal the positive provisions of a former statute, without a clause of repeal." In this case the act does not anywhere impose any direct charge, except upon goods landed or discharged upon the wharfs, and the Court will not give effect to any equivocal language, so as to increase the charge upon the public.

Cur. adv. vult.

Judgment was afterwards delivered by

Lord TENTERDEN, C. J.—This was an action of assumpsit, in which the plaintiffs claimed from the defendant a sum of 7*l.* 5*s.* 3*d.*, alleged to be due for the wharfage of certain

(*a*) 2 T. R. 358. (*b*) Id. 364.

goods of the defendant, shipped from off the plaintiffs' wharf. The question whether the plaintiffs were entitled to that sum or not, depended upon the construction which should be put upon certain acts of parliament regulating the affairs of the plaintiffs, the Hull Dock Company. In their behalf it was urged, that they were owners of the soil, and that as such they were *primâ facie* entitled; and, as a consequence, it was argued, that it lay upon the defendant to present the acts of parliament to the Court in such a light as to shew that he was exempt. That argument, if correct, would, in case of there being any doubt upon the effect of the acts of parliament, leave the plaintiffs to their common law remedy, as owners of the soil. Independently, however, of that, it was argued on behalf of the plaintiffs, that according to the true construction of the acts of parliament, they were entitled to the sum in question. We have considered the case, and our opinion is against the plaintiffs on both the points which have been argued. The first question is, whether the plaintiffs are entitled as owners of the soil, independently of the acts of parliament. We think they are not; and that whether owners of the soil, or not, they can claim nothing except that which is given to them by the acts of parliament. The act of the 14th of *George* the Third recites the act of the 14th of *Charles* the Second, which again recites the act of the first of *Elizabeth*. It also recites that there were certain staiths, the proprietors of which from time immemorial had landed and discharged, laden and shipped their goods and merchandize there, and that it was reasonable that their privileges should be continued to them. It then provides that the owners of such staiths shall be allowed to erect quays or wharfs. Then follow certain regulations as to those wharfs and the proprietors of them. Then the mayor and burgesses of the town are to be deemed the proprietors of the staiths for the purposes of the act; and by a subsequent provision, that corporation, the corporation of the Trinity House, and certain other persons therein named and described, are to be

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a corporation for the purposes of the act. From other parts of the act it appears that his then majesty had given some land, and that 15,000*l.* had been paid out of the revenue of the customs, for the purpose of advancing the public object of the act. Then certain payments are to be made: in short, all the provisions of this act, as is the case in other acts of a similar nature, appear to be matters relating to the arrangement of the terms of a bargain made by a company or association of adventurers with the public. The act contains the terms of the bargain; and the company are to receive the remuneration prescribed by the act, and no more. This then removes all question as to what would be the rights of the Company at common law as mere owners of the soil, and brings us to the second and main question in the case, namely, whether by the words of the acts of parliament the Company are entitled to the sum they claim of the present defendant for wharfage. The forty-fifth section of the 14th of *George* the Third is the chief enactment upon this part of the subject. It provides that all goods "landed or discharged" upon the wharfs shall be chargeable with the same rates as are chargeable for goods "loaded or discharged" upon the wharfs in the city of London. It was urged that the word "loaded" must have been introduced into the act of parliament by mistake. That is a question which we do not think it necessary for us to decide. There is no dispute as to what is the charge in the port of London, and it is admitted that for some purposes the expression "loaded upon" must of necessity mean "loaded from." But with reference to the charge sought to be enforced by this action, we see no reason for giving to the words "discharged upon," the meaning of "discharged from" the wharfs. We think other parts of the act of parliament shew beyond a doubt that the legislature had their attention drawn to the distinction between the two expressions. In the recital of the act of *Charles*, which is reciting the act of *Elizabeth*, there are the words "shipped or loaden aboard," and "landed or discharged

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out of or from," any ship or vessel. In the next page there are the expressions " landing and discharging"—" landing and shipping of goods"—and further on " landing and discharging"—" lading or shipping"—and so on. In the first seven or eight pages the words are to be found distinctly used, so as to leave no doubt on our minds that the attention of the legislature was called to the distinction between " landing on" and " shipping from." We cannot, therefore, allow this charge to be sustained upon the ground that they intended the expression " discharged upon" to bear the same meaning as the expression " shipped off." Then as to the proprietors of the staiths, the whole of this was a matter of bargain and compact, the terms of which are to be expounded as we should expound those of any other bargain or compact. Seeing, therefore, that the parties apparently knew the distinctive terms by the proper use of each, we cannot suppose that they have each made a mistake in the particular instance. It follows that the charge now made cannot be sustained upon the first act of parliament, and if not, it certainly cannot upon the second. The postea, therefore, must be delivered to the defendant.

Judgment for the defendant.

The KING on the Prosecution of WILLIAM STOCK *v.* THOMAS LEECH.

An indictment stating that *A. B.* gave certain justices to understand and be informed that *C. D.*, *being a brewer of beer or ale for sale*, did neglect, &c. is not supported by an information containing no allegation that *C. D.* was a brewer of beer or ale for sale, together with proof *aliunde* of his being such brewer.

THIS was an indictment for perjury, alleged to have been committed on the trial of an excise information before two magistrates. The indictment stated, " that one *Thomas Peachey*, being one of his majesty's officers of excise, who prosecuted as well for our sovereign lord the king as for himself, in his proper person came before the Rev. *Alexander Richardson*, doctor in divinity, and the Rev.

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William Toke, clerk, being two of his majesty's justices of the peace in and for the county of Essex, and gave the said justices to understand and be informed (they the said justices then and there having lawful and competent power and authority to receive the said information), that within the space of three months then last past, that is to say, on the 23d day of March, in the 7th year, &c., at, &c., *William Stock*, of, &c., victualler, *being a brewer of beer or ale for sale*, did neglect to make in writing, in the same book or paper in which he the said *William Stock* was by law required to give notice of every intended brewing, and of the quantity of malt by him intended to be used in such intended brewing, and opposite the entry of such notice and the quantity of malt there mentioned, a declaration of the whole length, or quantity and quality of all the beer then brewed by him the said *William Stock*, together with the name of him the said *William Stock*, in his own proper handwriting to such declaration affixed and subscribed, before any of the wort, beer, or ale so brewed was cleansed or removed, or run from the fermenting tuns into certain casks or vessels other than a known tun, cask, or vessel for fermenting beer, and specially entered by him the said *William Stock* for that purpose, contrary, &c." The indictment then went on to state the appearance of *Stock* before the magistrates, the evidence given by *Leech*, and assigned perjury in the usual form.

At the trial before *Gaselee*, J., at the last summer assizes for the county of Essex (*a*), the information exhibited before the magistrates, and upon which *Stock* had been convicted upon the testimony of *Leech*, was produced: but the words in italics were not found in it. It was objected that this was a fatal variance; and a verdict of guilty having been found upon the indictment for perjury, the learned Judge gave the defendant leave to move to enter a verdict in his favour upon the variance.

(*a*) Counsel for the prosecution, *Brodrick*, *Law*, and *Thesiger*; for the defendant, *Gurney* and *Chitty*.

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In last Michaelmas term *Gurney* obtained a rule, calling upon the prosecutor to shew cause why the verdict should not be set aside and a new trial had, or why the verdict should not be entered for the defendant. Against which,

Brodrick, *Law*, and *Thesiger*, now shewed cause. The description of *Stock* is no part of the information. [*Bayley*, J. By the indictment it is represented as part of that of which the justices were informed. Lord *Tenterden*, C. J. The question is, whether we can understand that *Peachey* informed the justices that *Stock* did so and so, or that he informed them that, being a brewer, he did so and so. *Bayley*, J. If the proceedings had been brought here by *certiorari*, could such an information have been supported?] It must be admitted that the information could not have been supported, but the prosecutor of this indictment had no means of seeing the information, and was obliged to assume that it was correct. But the words "being a brewer" may be considered as descriptive of the party, and not as expressly referring to the form of the information.

Lord TENTERDEN, C. J.—It is impossible to doubt that the framer of this indictment meant to assert that the party informed the justices, "that *Stock being a brewer* neglected."

Rule absolute to enter a verdict for defendant.

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ASSUMPSIT, upon a written agreement, the substance of which was, that plaintiff should sell a ship to defendant;

An agreement, that *A.* will sell a ship to *B.*; that part of the price shall be secured by mortgage of the ship; that *A.* will procure the ship to be chartered on a voyage; that the earnings on the voyage shall be paid to *A.* as part of the price; and that at the end of the voyage the mortgage shall close; is an agreement for and relating to the sale of goods, and requires no stamp.

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that part of the purchase-money should be secured by mortgage on the ship; that plaintiff should procure the ship to be chartered to London; that her earnings on the voyage should be paid to plaintiff in part of the purchase-money; and that on her arrival at London the mortgage should close. At the trial before Lord *Tenterden*, C. J., at the last London sittings (*a*), the agreement being produced, and having no stamp, a question arose whether it was admissible in evidence without a stamp. It was contended on the part of the defendant that it was not, for that it required an agreement stamp by the provisions of the statute 55 *Geo.* 3, c. 184, schedule, part 1, title "Agreement." Lord *Tenterden*, however, was of opinion that it came within the exemptions of the act, as an "agreement made for, or relating to, the sale of goods, wares, or merchandizes," and the plaintiff had a verdict.

Brougham moved for a rule nisi to set aside the verdict, and enter a nonsuit. The agreement was not receivable in evidence without a stamp. It was an agreement for the performance of two distinct and independent things; the one, to sell the ship; the other, to procure her to be chartered to London. The first may be within the exemption of the act, though even that seems doubtful, because the agreement appears to have been intended to operate as a transfer of the ship, pursuant to the Ship Registry Act, 6 *Geo.* 4, c. 110. But however that may be, the second, the agreement to procure the ship to be chartered, is most clearly not within the exemption, for that clearly is not an agreement for, or relating to, any sale of goods. To hold that an agreement to do several things, one only of which is within the exemptions of the act, shall escape taxation altogether, will be to hold out a premium for the practising of frauds upon the revenue. It was held in *Ames* v. *Hill* (*b*), and *Reardon* v. *Swaby* (*c*), that though

(*a*) Counsel for the plaintiff, *Gurney* and *Chitty*; for the defendant, *Brougham*.

(*b*) 2 B. & P. 105.

(*c*) 4 East, 188.

a *mere* cognovit need not be stamped, yet that if it contain any terms of agreement, it must be; and that, in principle, is an authority for saying that the agreement in this case required a stamp.

Lord TENTERDEN, C. J.—It was perfectly clear that the instrument in question was not intended to operate as a transfer of the vessel, pursuant to the Registry Act, 6 *Geo.* 4, c. 110, (*a*) because the vessel was to be mortgaged as a security for the payment of the purchase-money, and she was to be chartered to London, and her earnings upon that voyage were to go in part payment of the purchase-money. It was, therefore, really neither more nor less than an agreement for the sale of the ship, which I am clearly of opinion is within the exemptions of the act of parliament as an agreement for the sale of goods. The mere circumstance of other matters connected with the principal object being introduced, does not take the instrument out of the exemption. They are the terms of the agreement for the sale, but the instrument itself is not less an agreement for the sale of goods.

The other Judges concurred.

Rule refused (*b*).

(*a*) And see *Biddell* v. *Leeder*, 2 D. & R. 409; 1 B. & C. 327; *Kain* v. *Old*, 4 D. & R. 52; 2 B. & C. 627.

(*b*) In *Smith* v. *Cator*, 2 B. & A. 778, the rule is laid down by *Abbott*, C. J., as being, "that stamps are not required for those instruments only in which the sale of goods is the *primary* object." The same principle seems to have prevailed in *Curry* v. *Edensor*, 3 T. R. 524, where a broker having purchased goods for his principal, and guaranteed any loss in the re-sale, for so much per cent., by an unstamped note, it was held good. So, in *Venning* v. *Leckie*, 13 East, 7, where defendant agreed, by a note in writing unstamped, to take half the goods bought by plaintiff on their joint account, and to furnish half the money, it was held good. But in *Smith* v. *Cator*, 2 B. & A. 778, where the principal sent bills to his factor, on which he wanted to raise money, to be accepted by the factor, and for which the principal promised to provide, if goods of his then in the factor's hands were not then sold, this being by letter and unstamped, was held inadmissible, for the *primary* object was the raising of the money, not the sale of the goods.

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SPARKES *v.* BELL and Wife.

A wife sued with her husband for a debt contracted by her while sole, may be taken in execution, though her husband has been discharged from the debt under the Insolvent Debtors' Act.

F. KELLY had obtained a rule nisi for setting aside a Judge's order for discharging the female defendant out of custody, under the following circumstances:—Both the defendants had been sued to judgment, and taken in execution, for a debt contracted by the wife while sole. The husband had been discharged as to that debt under the Insolvent Debtors' Act, and had since deserted his wife. The wife had no separate property, except a small annuity which she received through trustees under her marriage settlement. The question was, whether the wife's person was now liable to be taken for this debt.

Archbold shewed cause. The question is, whether the wife is by law liable to be arrested a second time for a debt originally incurred by herself while sole, but in respect of which her husband has been discharged under the Insolvent Debtors' Act. It is submitted that she is not, for that the discharge of the person of the husband under the Insolvent Debtors' Act operated as a discharge of the person of the wife also. The point has been in effect so decided in a case of bankruptcy, *Miles* v. *Williams* (*a*), where it was held, that if a feme sole enters into a bond, and afterwards marries, and her husband becomes a bankrupt, the bond may be proved under the commission of bankruptcy issued against him; and that the husband's certificate was a good bar to an action on the bond brought against him and his wife. That was upon the principle that the bond was a debt owing by the husband at the time when he became bankrupt; which principle applies here: for this was a debt owing by the husband at the time when he took the benefit of the insolvent act. [*Bayley*, J. That decision went upon the ground that the bankruptcy and certificate of the husband operated as a discharge of the debt *altogether*; but the discharge under

(*a*) 1 P. Wms. 249.

the Insolvent Debtors' Act operates as a discharge of the insolvent's person only: it does not discharge the debt.] It seems difficult to imagine how the person of the wife can be liable, when the person of the husband has been discharged. [*Bayley*, J. Where the wife has separate property, as here, her person is clearly liable for a debt originally incurred by her, though her husband's person is discharged; for the debt continues: it is the same as if the husband was dead, in which case the wife's liability would revive.] The separate property of the wife may be made available to the creditor by elegit: but it seems hard to take her person under such circumstances.

Merewether, Serjt., and *F. Kelly*, contrà, were stopped by the Court.

BAYLEY, J. (*a*).—The order for this woman's discharge appears to have been made by me. I am not now able to say upon what grounds I was induced to make it, but I am perfectly satisfied that the order was improperly made. The debt was originally the wife's. Upon her marriage, her husband became jointly with her liable for it. His person has been discharged from it, but her's remains liable, as it would be in case of his death. Generally speaking, a wife sued with her husband is liable to be taken in execution, because the judgment survives against her. Where she is taken in execution by collusion between the creditor and her husband, the Court will interfere and discharge her: but that is not suggested to be the case here. Where it appears that all the wife's property has been engrossed by the husband, and she has no separate property, and nothing left with which to pay the debt, the Court may probably think it right to interfere (*b*). Here the wife has separate property, and though the circumstances are such, that if we were freed from the rules of law, and at liberty to judge of the case by the dictates of compas-

(*a*) Lord *Tenterden*, C. J., and *Holroyd*, J., were absent.

(*b*) And see *Deacon, ex parte*, 5 B. & A. 759.

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sion, we should probably feel inclined to relieve her; still, bound as we are to act according to the strict rules of law, and the strict rights of the parties, it is impossible for us to do so. The plaintiff, no doubt, supposes that by this pressure, in taking the wife's person, he will induce her to give up a portion of her separate property; and he is entitled to make the experiment. The case cited in argument is very different from the present; because there the discharge of the husband was a discharge by bankruptcy and certificate, which discharged the debt altogether, as regarded the husband; but here the discharge is only a discharge of the person of the husband. There is no clause in any of the insolvent acts declaring that the discharge of the husband, in a case like the present, shall operate as a discharge of the wife; and, on the contrary, the last act, 7 *Geo.* 4, c. 57, s. 72, provides that married women may obtain their discharge under that act, upon giving up their separate property. The case of *Chalk* v. *Deacon* (*a*), is decisive to shew that a married woman may be taken in execution in a case like the present; therefore the law upon the subject is free from doubt, and the rule for setting aside my order, and for suing out a new writ of capias against the wife, must be made absolute.

LITTLEDALE, J., concurred.

Rule absolute (*b*).

(*a*) 6 J. B. Moore, 128; Tidd, 8th ed. 1067; 9th ed. 1026.

(*b*) Where a woman who had given a warrant of attorney married during the term, and was afterwards taken in execution upon a judgment signed as of that term, and therefore having relation to the first day of the term, it was held that she could not be relieved. *Per Bayley*, J., in *Triggs* v. *Triggs*, Trin. Vac. 1815. And see 7 Vin. Abr. Default, O, *passim*; Barnes, 203; *Cooper* v. *Rachael Hunchin*, 4 East, 521; 3 Smith, 282, *S. C.*; *Deacon, ex parte*, 5 B. & A. 761.

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FINCH *v.* The BISHOP of ELY.

A bishop's registry of presentations is a public book; and a mandamus lies to him to grant inspection of it to one claiming a right to present to a vacant living, though the bishop claim a right to collate to it.

THIS was a rule calling upon the defendant to shew cause why a writ of *mandamus* should not issue, directed to him, commanding him to permit the plaintiff to inspect and take extracts from the books of the registrar of the defendant's diocese, touching a living situate within the diocese, and the next presentation to which was claimed both by the plaintiff and the defendant; application for that permission having been made and refused.

Storks, Serjt., and *Patteson*, shewed cause. The plaintiff has no right to an inspection of the documents in question, for he must be regarded in the light of a stranger. The plaintiff claims the next presentation to a living in this diocese, as against the defendant, who claims it also. Generally speaking, it may be admitted that the books in question are public documents; but as the defendant, who has the legal custody of them, is a claimant to the presentation, he must be considered, not in his public character of keeper of certain public documents, but in his individual capacity as claiming a particular right, and being in possession of certain evidence affecting that right: and then he comes within the principle of law which says, that a party shall not be compelled to furnish his antagonist with evidence against himself. In this point of view, the present case seems to be governed by the decision of this Court in *May* v. *Gwynne* (*a*), where it was held that the vestry-clerk of a parish was not compellable to produce and permit copies to be taken of documents from the parish chest in his custody, *for any other than parochial purposes;* and of *The Mayor of Southampton* v. *Graves* (*b*), where it was held that pending an action by a corporation for tolls, leave could not be granted to inspect the corporation muniments on the application of the defendant, a stranger to the corporation. [*Bayley*, J. These books are surely public documents in the fullest sense of the word. What right has the bishop,

(*a*) 4 B. & A. 301. But see *Fox* v. *Jones*, *ante*, i. 570. (*b*) 3 T. R. 590.

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who is only the keeper of them for the benefit of the public, to withhold them from the inspection of the public? I think it has been held that a lord of a manor is compellable to grant inspection of the court rolls of the manor to a tenant, although his own title may, in some degree, be in question (*a*)]. It is so in cases where the title of the copyholder is in question, and most properly, because the court rolls are the only evidence of title which he can possibly

(*a*) The cases upon this subject appear to turn upon nice distinctions. In *Rex* v. *Tower*, 4 M. & S. 162, where a copyhold tenant was forbidden by the lord to cut underwood upon the copyhold without the lord's license, the Court granted a *mandamus* to the lord to permit him to inspect the court rolls, so far as related to the cutting of underwood, after application to and refusal by the lord, although there was not any suit depending. In *Rex* v. *Shelley*, 3 T. R. 141, it is said that leave to inspect the court rolls of a manor will be granted of course on the application of a tenant of the manor who has been refused that permission by the lord. In *Addington* v. *Clode*, 2 W. Bla. 1030, it is said, that a freeholder within the manor may inspect the court rolls. But in *Smith* v. *Davies*, 1 Wilson, 104, a freeholder was refused a rule to inspect the rolls of a manor, in a case between himself and the lord, touching a copyhold. In *Rex* v. *Lucas*, 10 East, 235, it is said, that one who has a *primâ facie* title to a copyhold is entitled to inspect the court rolls, and take copies of them, so far as relates to the copyhold claimed, though no cause be depending for it at the time. In *Folkard* v. *Hemet*, 2 W. Bla. 1061, a rule to inspect court rolls relating to the defendant's title, in an action by one copyholder against another, for encroachment on the wastes of the manor over which the copyholders claimed a right of common, was granted. And in *Rogers* v. *Jones*, 5 D. & R. 484, a *mandamus* was granted to the steward of a manor to allow inspection of the court rolls to two tenants litigating a right of common in the manor, although the cause was not at issue.

The privilege of inspecting the court rolls and books of a manor appears, however, to be confined to the tenants of the manor. *Talbott* v. *Villebois*, Tidd, 9th edit. 594; cited also in *Rex* v. *Shelley*, 3 T. R. 142, where, in a question between the lord and a stranger, leave to inspect the court rolls was refused. In *Rex* v. *Allgood*, 7 T. R. 746, the Court said that even a freehold tenant of a manor has no right to inspect the court rolls, unless some cause be depending in which his right may be involved. *Smith* v. *Davies*, *ubi suprà*. And in *Rex* v. *Lord Cadogan*, 1 D. & R. 559, the Court refused a *mandamus* to the lord and steward of a manor to permit an inspection of court rolls, for the purpose of supporting an indictment against the lord, for not repairing a road within the manor.

have. Here that is not the case; on the contrary, it is submitted that these books, even if obtained, would not be evidence for the plaintiff, and that is a sufficient reason for refusing him an inspection of them. *Vin. Abr.* Evidence. H. b.

Scarlett, contrà. So decided is it that the books in question are public documents, and the entries in them evidence, that it is stated in *Gibson's Codex* to have been one of the articles of impeachment against the Bishop of Norwich, in the reign of *Charles* the First, that he had not kept his registry in regular and proper order. [Here the Court stopped him].

Lord TENTERDEN, C. J.—I am clearly of opinion that this rule ought to be made absolute. The books of a corporation are, generally speaking, open to the inspection of the corporators only, for corporate purposes. So, parish books are for the use of the parishioners only, for parochial purposes. But a bishop's registry is kept for the benefit of the public at large, and ought to be accessible to every individual who has, or who can by possibility claim title to, the presentation to a living within his diocese. Such books differ from those I before mentioned; they are, strictly speaking, public documents, and must be open to the public. It may be unfortunate for the bishop in this case, that being a claimant to the presentation, the disclosure of the books may affect his title; but still justice requires that the plaintiff should see the books, and the interest of the bishop must not be consulted at the expense of the rights of the public.

BAYLEY, J.—I think the fact of the bishop being a claimant in this case is a strong additional reason why the plaintiff ought to be allowed an inspection of these books, which are kept by the bishop himself for the benefit of the

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public. I quite agree that justice requires this rule to be made absolute.

HOLROYD, J., concurred.

LITTLEDALE, J., was gone to chambers.

Rule absolute.

HARROD *v.* BENTON.

The Court has summary jurisdiction over a warrant of attorney alleged to be fraudulent, on the application of any person interested in impeaching it.

THIS was a rule for setting aside a warrant of attorney, as having been fraudulently obtained. The party on whose behalf the rule nisi had been granted had obtained a verdict and judgment in C. P. against the defendant, who, as was alleged in the affidavits, had executed the warrant of attorney to the plaintiff *Harrod*, without consideration, in order to defeat the execution, which it was known was about to be levied in pursuance of the verdict and judgment. Both parties had sued out execution on their judgments; and the real object of the motion was to try which was entitled to priority. There were contradictory affidavits with respect to the validity of the warrant of attorney.

Comyn, for the party claiming under the warrant of attorney, shewed cause against the rule. The Court cannot entertain this motion, for they have no jurisdiction over the parties to it. It is not competent for a third person to come to the Court and move to set aside a warrant of attorney, upon whatever grounds, to which he is not a party; and the Court have no jurisdiction over such a matter between such third person and the party claiming under the warrant of attorney. There is no instance upon record of such a rule having been granted. If the warrant of attorney is impugned on the ground of fraud, that is a question for a jury; the Court cannot decide such a question on contradictory affidavits: an action against the sheriff is the proper course to be adopted.

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Steer, in support of the rule, (upon being asked by the Court if he had any authority for the motion) admitted that he had not been able to find any case exactly in point; but contended that, both by the statute of *Elizabeth* (*a*) against fraudulent alienations, and the general principles and practice applicable to similar transactions, the Court had power to grant summary relief, if they should see fit, without putting the party to the delay of a trial, either of an issue settled between the parties, or of an action against the sheriff. He was then stopped by the Court.

Lord TENTERDEN, C. J.—If the warrant of attorney was fraudulent and void, the judgment entered up on it is, of course, void also. In such case, the party, undoubtedly, has the remedy that has been suggested, of an action against the sheriff, to try the validity of the warrant of attorney and judgment. But it would be a hardship upon the sheriff to place him in the situation of defendant in such an action; and the Court always avoids, as much as possible, inflicting hardship upon public officers, and always interferes to protect them, so far as it properly can. If there is doubt whether the warrant of attorney is fraudulent or not, a jury, I admit, is the proper tribunal to decide the question; and, if the parties prefer that course, this rule may be enlarged, to give them time to make up and try an issue upon that point. Another and perhaps a better mode of settling the point, may be to refer this rule to the master. With respect to Mr. *Comyn's* objection, I am quite clear that the Court have jurisdiction over a warrant of attorney and a judgment founded upon it, on the application of any party in any manner interested in impeaching them, and applying to set them aside on the ground of fraud, although he is not a party to the warrant of attorney itself.

The parties elected to refer the rule to the master.

(*a*) 13 *Eliz.* c. 5. See the act, and notes thereon, Chitty's Collection of Statutes, 385; *Wormall* v. *Young*, 8 D. & R. 442; *White* v. *Hussey*, Prec. Cha. 14; 2 Eq. Ca. Abr. 478.

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GWINNESS v. CARROLL.

A plea in bar, stating "that a commission of bankrupt issued against plaintiff, under which he was duly found, adjudged, and declared a bankrupt," without alleging that he was in fact a bankrupt, is bad.

Such a plea should state the trading, the act of bankruptcy, and the petitioning creditor's debt.

Whether in debt on judgment, a replication to a plea of bankruptcy in the plaintiff after the accruing of the cause of action whereon judgment was recovered, that plaintiff obtained his certificate before the judgment was recovered, should allege expressly that the certificate was obtained after the commission issued, *quære.*

DEBT upon a judgment recovered in Ireland in Michaelmas term, 4 *Geo.* 4. Plea, that *at the time* when the debts in the declaration mentioned were contracted, and the supposed causes of action accrued, plaintiff and defendant were domiciled in Ireland, and that *afterwards* a commission of bankrupt issued against plaintiff at Dublin, and plaintiff was in due manner found, adjudged, and declared a bankrupt. Replication, that *after* the issuing of the commission, and *long before* the judgment was recovered, plaintiff duly obtained his certificate, which certificate afterwards, and long before the judgment was recovered, was duly allowed. Demurrer to the replication, and joinder in demurrer.

Campbell in support of the demurrer. The replication is argumentative and bad. The plea states, that the commission issued and the plaintiff was declared a bankrupt, after the cause of action accrued. Now the replication does not deny that, but only avers that before the judgment was recovered the plaintiff obtained his certificate; not shewing, except argumentatively, that the certificate was obtained after the commission issued. That is clearly bad.

Parke, contrà, was stopped by the Court.

BAYLEY, J. (*a*)—We need not consider whether the replication is good or bad, because it is perfectly clear that the plea is bad. The plea does not allege plainly and affirmatively that the plaintiff *was* a bankrupt, it merely states that a commission of bankrupt issued against him, and that he was in due manner found, adjudged, and declared a bankrupt. That is by no means precise and specific language enough for such an allegation. A plea of bankruptcy ought to state the trading, and all the particulars

(*a*) Lord *Tenterden*, C. J., was absent.

necessary to lead to the issuing of a commission, and to the constituting a man a bankrupt, and should aver plainly that the party *was* a bankrupt. As this plea is framed it is impossible for the plaintiff to take issue upon the question whether he *was* a bankrupt or not.

The other Judges concurred.

Campbell then obtained leave to amend.

WHYTT *v.* MACINTOSH.

Where a defendant obtains a *mandamus* under 13 *Geo.* 3, c. 63, s. 44, to examine witnesses in India, the plaintiff, having recovered a verdict, is entitled to his costs of cross-examining such witnesses.

IN this case the defendant, after opposition on the part of the plaintiff, had obtained a *mandamus* for examining witnesses in India on his behalf, under the statute 13 *Geo.* 3, c. 63, s. 44. They were examined accordingly for him, and cross-examined for the plaintiff, in the usual mode, and their evidence read at the trial. The plaintiff obtained a verdict. Upon the taxation of costs, the master allowed to the plaintiff his expenses in cross-examining these witnesses, whereupon a rule *nisi* was obtained for the master to review his taxation, against which

Wightman shewed cause. The act of parliament which regulates examinations on interrogatories of witnesses in India, for the purpose of reading their evidence in actions brought in this country, is silent upon the subject of the costs so incurred (*a*). It is clear, however, that the act of

(*a*) 13 *Geo.* 3, c. 63, s. 44, which recites that "his Majesty's subjects are liable to be defeated of their several rights, titles, debts, dues, demands, or suits, for which they have cause arising in India, against other subjects of his Majesty," and "for preventing such failure of justice," enacts, "that as often as the East India Company, or any person whatever, shall commence and prosecute any action or suit in law or equity, for which cause hath arisen or shall arise hereafter in India, against any other person whatever, in any of his Majesty's courts at Westminster, it shall and may be lawful

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parliament does no more than make that evidence by law which could otherwise only have been made evidence by consent of the parties. If that act had never been passed, and the witnesses for the defendant had been brought from India to this country for the purpose of being examined, the plaintiff would clearly have been entitled to his costs, if any, in respect to them; and the statute was not intended, nor ought it to be construed, to put a plaintiff in a worse situation than he was in at common law. This is not like the case of an examination upon interrogatories, where it has been held that the party succeeding is not entitled to the costs of examining witnesses, or taking office copies of depositions, *Stephens* v. *Crichton* (*a*); for there the Court grants the commission always upon certain terms, which terms are expressed in the rule; and if the rule be silent with respect to costs, the successful party is, of course, not entitled to them. But here the Court has no discretion, and can impose no terms; the defendant has the *mandamus* as a matter of right; and the plaintiff, being entitled to cross-examine the defendant's witnesses, and having obtained a verdict, is entitled to the expense attending such cross-examination as a matter of course.

J. Evans, contrà. This act of parliament was passed fifty-four years ago, and yet there is not to be found in any of the books one recorded case of the allowance of such costs as are now contended for by the plaintiff. To allow these costs will be in effect to decide that they are costs in

for such Court respectively, upon motion there to be made, to provide and award a writ in the nature of a *mandamus* or commission, to the Chief Justice and Judges of the Supreme Court of Judicature for the time being, or the Judges of the Mayor's Court at Madras, Bombay, or Bencoolen, as the case may require, for the examination of witnesses; and such examination being duly returned shall be allowed and read, and shall be deemed good and competent evidence at any trial or hearing between the parties in such cause or action," &c.

(*a*) 2 East, 259.

the cause, which it will be against all principle to make them. This case is precisely analogous to a commission for examining witnesses on interrogatories, where, it is admitted, the successful party is not entitled to costs, unless the rule expressly gives them to him; for here the statute is silent with respect to costs, and therefore leaves the Court the same discretion, with regard to them, as they have in the other case. The *mandamus*, like the commission, is moved for and granted by rule of court; and the plaintiff, when he obtained it, should have made it part of the rule that he was to be allowed the costs if he succeeded. A commission, generally speaking, is not granted but by consent; but this *mandamus* was a proceeding *in invitum*, for the plaintiff did all he could to oppose its being granted; and when that is the case, the course in cases of commissions, the only analogous proceeding, has always been for each party to pay his own costs. This is clear from the cases of *Stephens* v. *Crichton* (*a*), *Taylor* v. *The Royal Exchange Assurance* (*b*), and is laid down in *Tidd's* Practice (*c*); and the same authorities shew that costs such as these ought not to be considered costs in the cause.

Cur. adv. vult.

Judgment was now delivered by

Lord TENTERDEN, C. J., who, after stating the facts of the case and the nature of the question raised by the motion, thus proceeded:—The Court had no power to refuse the defendant the *mandamus* for which he applied. The master, upon the taxation of costs, thought it but reasonable, and considered himself at liberty, to allow to the plaintiff his costs in cross-examining the defendant's witnesses under the *mandamus*. The act of parliament is wholly silent upon the subject of costs. It is, therefore, in the breast of the Court to say, whether these costs ought to be allowed

(*a*) 2 East, 259.
(*b*) 8 East, 392.
(*c*) Vol. ii. p. 855, 6th ed.

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to the plaintiff or not. It seems to us impossible to doubt what is the justice of the case. The obtaining the *mandamus* for the examination of witnesses on his behalf was the defendant's own act; and it was clearly but just that the plaintiff should have an opportunity of cross-examining them. In so doing he incurred expenses; and we think the master has done right in saying, that as the plaintiff recovered a verdict, he ought to be reimbursed those expenses by the defendant. We are therefore of opinion that the plaintiff is entitled to have this

Rule discharged (*a*).

(*a*) The right of a plaintiff to final costs is founded upon the statute of Gloucester, (6 *Edw.* 1,) which gives the plaintiff *the costs of his writ purchased*, in all cases where the party is to recover damages. By a liberal construction, this statute has been extended to all the legal costs of a suit, (2 Co. Inst. 288,) whether commenced by writ or by bill. And see Hull. Costs, 2d ed. 3.

The ARCHBISHOP of CANTERBURY *v.* TAPPEN.

Under the common administration bond, conditioned to make and exhibit a true inventory, administer according to law, make a just account, and pay the residue to such person as the Ecclesiastical Judge shall decree, it is no breach of the condition that the administrator has not paid the residue to the next of kin, unless an Ecclesiastical Judge has decreed payment.

DECLARATION in debt on bond, dated 10th May, 1809. First plea, (after craving *oyer* of and setting out the bond and condition, which shewed that Sir *T. H. Page*, administrator of a Mrs. *Woollaston*, deceased, as principal, and one *Edwards* and defendant as sureties, executed the usual administration bond to the Archbishop, conditioned, first, to make and exhibit a true inventory of the estate of the deceased before the end of November, 1809; secondly, *to administer the estate according to law;* thirdly, to make a just account of the administration before the end of May, 1810; fourthly, to pay over the residue of the estate to such persons as the Judge of the Ecclesiastical Court by his decree should appoint;) that Sir *T. H. Page* did make and

exhibit a true inventory of the estate of the deceased before the end of November, 1809, and did *truly administer the estate according to law,* and that no judge had decreed to whom Sir *T. H. Page* should pay over the residue of the estate, and that he was cited before the Ecclesiastical Court, and the suit dismissed. Second plea, similar, only omitting the averment of the citation and the dismission of the suit. Replication to both pleas, that divers effects of the deceased came to Sir *T. H. Page's* hands, but that he did not make an inventory thereof, or exhibit the same; second breach, that the deceased left, as her next of kin, Sir *T. H. Page,* and several other persons (enumerated) her nieces; and that Sir *T. H. Page* paid off all the debts of the deceased, and there remained in his hands a residue of 10,000*l.*, which he ought to have distributed among the next of kin, whereof he had notice, but had not well and truly administered. Rejoinder to the first breach, that Sir *T. H. Page* did make and exhibit an inventory; and to the second, that no judge of the Ecclesiastical Court had decreed that Sir *T. H. Page* should pay over the residue, &c. Demurrer to the rejoinder, assigning for cause, that by the bond Sir *T. H. Page* was bound to administer without any previous suit or decree, and that the rejoinder, therefore, was no answer to the breach. Joinder in demurrer.

Chitty, in support of the demurrer. The question in this case will turn upon the effect and meaning of the words, "well and truly administer according to law," in the condition of the administration bond. The form of the condition is given by the statute 22 and 23 *Car.* 2, c. 10, s. 2 (*a*), and is correctly followed in the present case; and

(*a*) The condition is in these words:—"If the within bounden *A. B.*, administrator of all and singular the goods, chattels and credits of *C. D.*, deceased, do make or cause to be made, a true and perfect inventory of all and singular the goods, &c. of the said (deceased,) which have or shall come to the hands, possession or knowledge of him the said *A. B.*, or into the hands and possession of any other person or persons for him, and the same so made do exhibit

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by that condition one of the things required to be done by the administrator is, well and truly to administer, according to law, the goods of the deceased. This case has already been before the Prerogative Court of Canterbury, upon a petition that the bond should be pronounced forfeited (*a*); where the bond was pronounced forfeited by the learned Judge of that Court, Sir *John Nicholl*. It is submitted that the obligation of an administrator well and truly to administer the estate of the deceased according to law, is one that lies upon him wholly independent of any ecclesiastical jurisdiction, and that he is bound to perform his duty in that respect fully, and including the distribution of the residue, without any citation before the Spiritual Court, or any decree by that Court, putting him in motion. Sir *John Nicholl* seems to have been clearly of this opinion, as appears from part of his judgment in *Devey* v. *Edwards* (*b*). He says, "What, so far as respects the present question, (whether the bond was forfeited or not,) are the conditions of an administration bond? The bond is *conditioned* for the administrator exhibiting an inventory, and rendering a true and just account of his administration; *and for making due distribution of the residue of the effects of the intestate*, as the statute of distributions limits and appoints." The

or cause to be exhibited into the registry of —— Court, at or before the —— day of —— next ensuing; and the same goods, &c. and all other the goods, &c. of the said (deceased) at the time of his death, which at any time after shall come to the hands or possession of the said *A. B.*, or into the hands and possession of any other person or persons for him, *do well and truly administer according to law;* and further do make, or cause to be made, a true and just account of his said administration, at or before the —— day of —— and all the rest and residue of the said goods, &c. which shall be found remaining upon the said administrator's account, the same being first examined and allowed of by the Judge or Judges for the time being of the said Court, shall deliver and pay unto such person or persons respectively, as the said Judge or Judges by his or their decree or sentence, pursuant to the true intent and meaning of this act, shall limit and appoint, then the said obligation to be void," &c.

(*a*) Under the name of *Devey* v. *Edwards* and *Tappen*, 3 Addams's Ecclesiastical Reports, 68.

(*b*) 3 Addams, 74.

learned Judge then takes a review of the facts of the case, and adds, "The bond, under these circumstances, is clearly forfeited; its conditon, *in the most essential article, that of distribution*, not having been, in any sort, complied with." There are other authorities in favour of this construction. In *The Archbishop of Canterbury* v. *Willis* (*a*), it was decided that an administrator is bound to account without citation; and Lord *Holt* there said, "since the statute of *Charles* 2, the condition of administration bonds being that he (the administrator) account at a day certain, he must account accordingly at peril, *and that without citation or suit.*" The same was decided in *Greenside* v. *Benson* (*b*) with respect to the administrator delivering an inventory, where Lord *Hardwicke* said, "there is no doubt but the archbishop's commissary may assign a breach in not delivering a true and perfect inventory, *and even without citation.*" In *The Archbishop of Canterbury* v. *House* (*c*), Lord *Mansfield* seems to have considered it the duty of the administrator under the bond to distribute the residue; for he said, "let us see what it is which the act requires the archbishop or his ordinary to do: he is to grant administration, and to take bonds with condition that the administrators shall duly administer the intestate's effects; that they shall give an account of such their administration, and make an inventory of the goods and chattels; *and that they shall pay the surplus to the next of kin.*" It will be contended, on the part of the defendant, that as the third section of the statute empowers ordinaries and judges of the Ecclesiastical Courts to call administrators to account for intestates' goods, and upon hearing and considering their accounts, to order and make distributions of the residue, and to decree and settle such distributions, and to compel administrators to observe and pay the same, the administrator has a right to wait till the judge or ordinary has exercised that power, and is not

(*a*) 1 Salk. 315.
(*b*) 3 Atk. 248.
(*c*) Cowper, 140.

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bound by the condition of the bond to distribute until he is, by an order or decree of the Ecclesiastical Court, compelled to do so. That, however, does not appear to be the fair meaning and operation of that section, when considered with reference to the condition of the bond and the other sections of the act of parliament. The condition of the bond is to administer according to *law*. The law is contained in the act of parliament giving the form of the condition, and part of that law is, that the administrator shall distribute the residue. Sect. 5 provides, "that all ordinaries, *and every other person*, who by this act is enabled to make distribution of the surplusage of the estate of any person dying intestate," clearly including administrators, "*shall distribute* the whole surplusage of such estate or estates in manner and form following," &c. That is a peremptory enactment, without qualification or reserve, without reference to any order or decree, making it imperative upon the party to distribute the residue, as a part performance of his duty in administering according to law.

Platt, contrà. It is perfectly clear, upon the face of the pleadings in this case, that the administrator has "well and truly administered the estate of the intestate according to law." Those are the words of the condition of the bond, and it is plain, when they are looked at in connection with the other provisions of the statute in which they are found, that they were not intended to include the administration or distribution of the surplus estate. The eighth section of the statute is decisive of this point. That provides that "to the end that a due regard be had to creditors, no such distribution of the goods of any person dying intestate be made *till after one year be fully expired* after the intestate's death;" whereas the condition of the bond is well and truly to administer, *within one year* after the intestate's death: so that if well and truly administering in the condition includes making distribution in the eighth section, the one is contradictory of, and impossible to be reconciled with the

other. But, wherever else the distribution of the residue is spoken of in the act, it is after mention of, or in evident connection with, a decree of the Spiritual Court first made for that purpose. By section 2, which gives the form of the condition, the administrator, "all the rest and residue of the said goods, &c. which shall be found remaining upon the said administrator's account, the same being first examined and allowed of by the judge or judges for the time being of the said Court, shall deliver and pay unto such person or persons respectively, as the said judge or judges *by his or their decree or sentence*, pursuant to the true intent and meaning of this act, shall limit and appoint." By section 3, "ordinaries and judges respectively shall and may, and are enabled to proceed and call such administrators to account for and touching the goods of any person dying intestate; and upon hearing and due consideration thereof, *to order and make just and equal distribution* of what remaineth clear, (after all debts, funeral, and just expenses of every sort, first allowed and deducted,) among the wife and children, &c. according to the laws in such cases *and the rules and limitations hereafter set down;* and the same distributions *to decree and settle, and to compel such administrators to observe and pay the same by the due course of his majesty's ecclesiastical laws.*" By the fifth and two following sections, the rules and limitations mentioned in the third are set out; and though the fifth does provide "that all ordinaries, and every other person, who by this act is enabled to make distribution, &c. *shall distribute,*" &c., that must clearly mean a distribution according to the provisions of the act, namely, after a decree of the judge or ordinary for that purpose first obtained. Then the cases cited on the other side are all distinguishable from the present. The point really decided in *The Archbishop of Canterbury* v. *Willis* (*a*) was that a creditor cannot sue an administrator upon the bond for nonpayment of a debt of the intestate; which does not in any respect touch this case. [*Littledale,*

(*a*) 1 Salk. 315.

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J. It is there said by Lord *Holt*, "and whereas by the words of the condition he is to administer well and truly, that shall be construed in bringing in his account, and not in paying the debts of the intestate;" then if the plaintiff in this case had assigned a breach for not accounting, he would clearly have been entitled to judgment.] Perhaps so; but there is no such breach assigned: the only question here is, whether well and truly administering means distributing the residue independently of any citation or decree of the spiritual court for that purpose.

Lord TENTERDEN, C. J.—This is a somewhat novel and extremely important question, and we shall therefore take time for consideration before we dispose of it.

Cur. adv. vult.

Judgment was now delivered by

Lord TENTERDEN, C. J., who, after recapitulating the pleadings, thus proceeded:—Upon these pleadings the question of law for our decision is, whether the neglect or refusal of the administrator to distribute the surplus or residue of the intestate's effects among the next of kin, according to the statute of distributions, without being previously cited before the Ecclesiastical Court, and a decree to that effect being pronounced, is, or is not, a breach of the condition of the administration bond. The question is not whether such neglect or refusal is, generally, a breach of the duty of an administrator, but, whether it is a breach of the condition of the administration bond; and we are all of opinion that it is not. The question does not appear to have been ever expressly decided in any Court. According to the report of the proceedings in this very case, upon an application to Sir *John Nicholl* to pronounce the administration bond forfeited, that very learned Judge seems to have thought differently, and to have been of opinion that such neglect or refusal of the administrator might operate

as a breach of the condition of the administration bond. His attention, however, was not directed to the precise point which has been raised before us. The principal struggle before him was, whether under the circumstances of the case the sureties were so clearly exonerated as to be entitled to a dismissal; and it is obvious, from some parts of his judgment, that he would have thought it right to try *this* question in a court of common law. The form of the administration bond is given by the statute 22 & 23 *Car.* 2, c. 10, and the section containing the form of the bond is immediately followed by the section directing the mode of distribution, namely, according to the decree of the judge or ordinary. According to the form of the replication, it appears that the plaintiff contends, and the argument on his behalf was to that effect, that an administrator cannot be said well and truly to have administered the effects of the intestate, until he has shared the surplus among the next of kin. But the condition of the bond does not bind him to pay over the surplus; that only binds him the effects, &c. well and truly to administer according to law, and to make a true and just account of his administration; and then, *afterwards*, the rest and residue of the goods, &c. to deliver and pay to such persons as the judge by his decree shall appoint. Now what would it be necessary for the administrator to do, according to the ordinary course there *first* pointed out, and how far does that agree with what the statute requires? The statute first requires the ordinary to take the administration bond, the form of which it next sets out, and then provides, that such bond shall be good to all intents and purposes, and pleadable in any court of justice. It then enacts that ordinaries shall call administrators to account touching the goods of intestates; and upon hearing and due consideration thereof, shall order and make just and equal distribution of what remaineth clear, (after all debts, funeral, and just expenses of every sort, first allowed and deducted,) among the wife and children, or children's children, if any such be, or otherwise

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to the next of kindred to the dead person in equal degree, or legally representing their stocks *pro suo cuique jure*, according to the laws in such cases, and the rules and limitations hereafter set down; and the same distributions to decree and settle, and to compel such administrators to observe and pay the same by due course of his majesty's ecclesiastical laws. That is the third section. Then the fifth section enacts, that all ordinaries, and every other person, who by this act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner or form following, &c.; giving the form of distribution. Then the eighth section provides, that to the end that a due regard be had to creditors, no such distribution shall be made till after one year be fully expired after the intestate's death, and that every one to whom any distribution shall be allotted shall give bond with sufficient sureties, to refund and pay back to the administrator his ratable part of any debts discovered after the distribution made, out of the part and share so allotted to him. It appears, therefore, from the statute, that the ordinary is to decree distribution among the persons by law entitled, and the administrator is to make distribution according to that decree. But as in many cases the claimants may be numerous, and it may be difficult to ascertain with certainty who are entitled, the administrator, though compelled to distribute according to the ordinary's decree, is, nevertheless, for his own proper protection, to have a bond from the parties, undertaking, if more debts of the intestate should be discovered, to refund ratably, so as to indemnify him from such debts and their consequences. Then, as the administrator has a right to have the decree of the ordinary before he makes distribution, and as the decree of the ordinary is only to be made after hearing and considering the administrator's account; it follows that the bond previously required of the administrator, "well and truly to administer according to law," cannot be a bond "to make just and equal distribution of what re-

maineth clear," among the next of kin. It is true that where an administrator means to act faithfully and honestly, there will be no necessity for all these proceedings, and he will make out his account, and distribute the residue, without putting the claimants to prove their title, and obtain a decree in their favour, in the Ecclesiastical Court; and such being generally the practice, it may very naturally have been generally understood, that the undertaking to administer according to law was of itself an undertaking to make distribution among the next of kin. But, though this may be naturally the popular understanding upon this subject, we are of opinion, for the reasons I have mentioned, that such is not the true construction and effect of the administration bond in point of law. And we are supported in this opinion by some high judicial authorities. In *The Archbishop of Canterbury* v. *Wills*(*a*), Lord *Holt*, speaking on this subject, says, " since the statute of *Car.* 2, the condition of administration bonds being, that he (the administrator) account at a day certain, he must account accordingly at peril, and that without citation or suit, and this account must be in Court; and if he comes at the day, and no Court is held, he shall be excused. But then this account is not examinable, unless a party interested comes in and controverts it: and whereas by the words of the condition, he is to administer well and truly, that shall be construed in bringing in his account, and not in paying the debts of the intestate; and therefore a creditor shall not take an assignment of the bond, and sue it, and assign for breach the non-payment of a debt to him, or a devastavit committed by the administrator, for that would be needless and infinite." Now if a creditor cannot sue the administrator upon the bond for a debt of the intestate, because the words of the condition " well and truly to administer" do not by law import that he is to pay the intestate's debts, *à fortiori* they cannot import that he is to pay the surplus to the next of kin. Again, in *Greenside* v. *Benson*(*b*), Lord *Hardwicke*

(*a*) 1 Salk. 316. (*b*) 3 Atk. 252.

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says, "there is no doubt but the archbishop's commissary, the obligee, may assign a breach in not delivering a true and perfect inventory, and even without citation, and nothing else appears at law, and there must have been a judgment for the ordinary, because no doubt there was a breach in not exhibiting such an inventory. But the ordinary, after an administrator has exhibited an inventory, cannot compel the administrator to account, but it must be *ad instantiam partis*, and therefore the inventory and account are as to the ordinary the same thing." Upon the whole, therefore, we are of opinion that the breach assigned in this case is bad, and that the defendant is entitled to judgment on the demurrer.

Judgment for the defendant on demurrer.

The KING *v.* The Inhabitants of MAULDEN.

An order for the payment to the treasurer of a lunatic asylum of a gross sum for the bygone maintenance, &c. of a pauper lunatic, and of a certain future weekly sum, is bad for the former sum.

ON the 19th of April, 1824, the following order was made by two justices:

County of Bedford, } To the churchwardens and over-
to wit, } seers of the poor of the parish of Maulden, in the said county. Whereas we *George Cardale* and *Thomas Barber*, clerks, two of his Majesty's justices of the peace, acting in and for the said county, by virtue of the powers vested in us by an act of parliament passed in the fifth year of the reign of King *George* the Fourth, entitled, "An Act to amend several Acts passed for the better Care and Maintenance of Lunatics, being Paupers or Criminals, in England," and by desire of the visiting justices of the General Lunatic Asylum at Bedford, in the said county, after due examination had on oath, having adjudged the legal place of settlement of *Elizabeth Cole*, now a pauper lunatic, confined in the said Lunatic Asylum at Bedford aforesaid, to be in the parish of Maulden aforesaid, do hereby, by virtue of the powers vested in us by an act passed in the forty-eighth year

of the reign of King *George* the Third, entitled, "An Act for the better Care and Maintenance of Lunatics, being Paupers or Criminals, in England," require you, the churchwardens and overseers of the poor of the said parish of Maulden, to pay to the treasurer of the said asylum the sum of 10*l.* 16*s.* being the amount due for twenty-four weeks maintenance, medicine, and clothing of the said *Elizabeth Cole*, at the rate of 9*s.* per week, as fixed upon by the visiting justices of the said asylum, from the 2d of November, 1826, to the 19th of April, 1827, the day of making this our order. And we the said justices do further order and direct you the said churchwardens and overseers of the poor of the said parish of Maulden to pay, from the date hereof, the sum of 9*s.* per week, or such other weekly sum, to the treasurer of the said asylum for the time being, as shall from time to time be fixed upon by the visiting justices of the said asylum, as a fit rate of maintenance, medicine, and clothing of the said *Elizabeth Cole*, during so long time as the said *Elizabeth Cole* shall be and remain in the said asylum. Given, &c.

The churchwardens and overseers of Maulden having appealed against this order, it was confirmed by the following order:—

"The Churchwardens and Overseers of the Poor of the Parish of Maulden, . . *Appellants*,

AND

George Cardale and *Thomas Barber*, Clerks, two of the Justices of the Peace for the County of Bedford, ... *Respondents*.

"Upon hearing an appeal in pursuance of a notice in the following words:—*George Cardale* and *Thomas Barber*, clerks, two of his Majesty's justices of the peace in and for the county of Bedford. We, the undersigned, churchwardens and overseers of the poor of the parish of Maulden, in the county of Bedford, do hereby give you notice, that we intend to enter and prosecute an appeal at the next general quarter session of the peace, to be holden at Bed-

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ford, in and for the county of Bedford, against an *order of settlement* and maintenance, made under the hands and seals of you the said *George Cardale* and *Thomas Barber*, bearing date the 19th day of April last past, *for and concerning the settlement* and maintenance of *Elizabeth Cole*, a pauper lunatic, then and now confined in the Lunatic Asylum at Bedford, in the said county of Bedford. Dated the 30th day of June, 1827.

John Seabrook, churchwarden.

T. W. Overman, *Charles Halworth*, overseers.

It is ordered that the said order be confirmed."

The original order and the order of confirmation having been removed into this Court by *certiorari*, *Bolland*, in the last term, obtained a rule, calling upon the prosecutors to shew cause why both orders should not be severally quashed for the insufficiency thereof, upon notice of that rule, to be given to the treasurer of the said asylum, and to the two justices who made the original order, on the ground that it purports to be made in consequence of a previous adjudication, none such having been made; and secondly, that the justices had no jurisdiction as to making an order for *past* maintenance.

The *Solicitor General*, *Hawkins*, and *F. Kelly*, now shewed cause. Upon the first point, it is not necessary that the adjudication should be in writing, or that it should be set forth in the order of maintenance. The Court will not assume any thing against an order. [*Bayley*, J. Is there any instance of a verbal order of maintenance?] At all events, the examination need not be in writing. Whether there had been a sufficient adjudication of the settlement was a question of fact for the Court below. The fact of an adjudication does appear upon the face of the order. Upon looking at this order, every thing appears to have been done which the act requires. It is stated to be after due examination had on oath. The next objection is, that the order ought not to be retrospective. The language of

the 48 *Geo.* 3, c. 96, s. 24 (*a*), and 5 *Geo.* 4, c. 71, s. 3 (*b*), is very general. By these statutes the magistrates are to fix the weekly rate of payment; and the intention of the legislature to provide for the support of lunatic paupers could not be executed, if there was no power to make an order in respect of by-gone time. A long time may elapse before the settlement can be ascertained, and if no power

(*a*) By which it is enacted, that in all cases where any such lunatic asylum shall have been established under the authority of this act, the visiting justices appointed as aforesaid to superintend the same, or the major part of them, such major part not being fewer than five, shall from time to time make such regulations as to them shall seem expedient for the management and conduct thereof; in which regulations shall be set forth the number and description of officers and servants to be kept, the duties to be required, and what salaries shall be respectively paid to them; and may appoint a treasurer and such other officers and servants, together with such number of assistants as they shall from time to time find necessary, in proportion to the number of persons confined in such asylum; and may dismiss any such officer, servant or assistant, if they see occasion; and shall from time to time fix a certain weekly rate to be paid for such person confined in such asylum, which may be sufficient to defray the whole expense of the maintenance and care, medicine and clothing, requisite for such person; and the salaries of the officers and attendants: provided always, that such rate shall in no case exceed 14*s.* per week, and that the said visiting justices shall annually audit the accounts of the treasurer, and report the same to the next general quarter session of the peace, to be holden for the county, at the expense of which such asylum has been established.

(*b*) Which enacts, that in any case in which a lunatic or dangerous idiot, whose settlement by reason of the lunacy of such person cannot be ascertained, shall be by the order of two justices confined in any lunatic asylum, it shall and may be lawful for any two justices, acting in and for the county in which the said asylum shall be situated, at any time to examine into the legal settlement of such lunatic or dangerous idiot, and if satisfactory evidence can be obtained as to such settlement, it shall and may be lawful for such justices to adjudge the last legal settlement of such lunatic to be in such parish or place as may on such evidence appear to them to be the place of such legal settlement, and forthwith to make an order on such overseers of the poor of such parish or place to pay such weekly sum to the treasurer of such asylum, as shall have been fixed by the visiting justices, as a fit rate for the maintenance, medicine, clothing and care of lunatics confined in such asylum.

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to give by-gone expenses exists, no lunatic can be received into the asylum without a previous adjudication as to the settlement. With reference to 43 *Eliz.* (*a*) it has been expressly held that an order of maintenance may be retrospective; *Rex* v. *Joyce* (*b*). Now there is nothing in the statute of *Elizabeth* which expressly authorizes a retrospective order. [*Bayley*, J. Suppose, instead of twenty-four weeks, it had been as many years?] The words of the statute are sufficiently large to include such an order.

Bolland, contrà. The order is bad on both grounds. By the 48 *Geo.* 3, c. 96, s. 17, the magistrates are authorized and directed to issue warrants for the conveyance of pauper lunatics to the county lunatic asylum, and at the time of such issuing such warrant every such justice shall also make an order upon the overseers of the poor of the parish *to which such lunatic, &c. shall belong*, to pay such weekly sum to the treasurer of such asylum, as shall, from time to time, be fixed upon by the visiting justices as a fit rate for the maintenance, medicine, clothing, and care of such person. This provides what shall be done where the place of settlement is known; but where that cannot be ascertained, the maintenance of the lunatic is provided for by section 20 (*c*). But there is nothing to authorize the justices to make a retrospective order.

(*a*) Cap. 2.

(*b*) 16 Vin. Abr. 423.

(*c*) Which enacts, that in case the place of the last legal settlement of any lunatic or mad person apprehended by virtue of the above-recited acts cannot be ascertained, then the justices who shall have caused such person to be apprehended shall, by their said warrant, direct such person to be confined in the lunatic asylum for the county, or districts of united counties, within which such person shall have been apprehended, if any such asylum shall have been established, and not elsewhere; or if no such asylum shall have been established, in some house duly licensed for the reception of lunatics as aforesaid, or in some other secure place; and if such person have not an estate to pay and satisfy the reasonable charges of removing, and of keeping, maintaining, and curing such person, under the authority of the said recited act, then such charges shall be satisfied and paid by the treasurer of the county within which such person shall be apprehended, out of the county rates, by order of two justices to him directed for that purpose.

Lord TENTERDEN, C. J.—Upon reading the notice of appeal, the order must be taken to have proceeded upon a previous inquiry into the settlement of the party; but a question is raised as to the validity of this order, whether there is a sufficient adjudication of a settlement. The justices say, "after having adjudged," if they had said, "we, after due examination, do adjudge," there would have been no difficulty upon this part of the case, and this seems to be the effect of what they state. Then comes the question, whether the order is good altogether. It may be good in part and bad in part. They first direct a payment for the time past, next for the time to come. It is objected that the former part of the order is illegal. I think they had not any right to make such an order. If this part of the order is good, it will be difficult to say for what period such an order might be made to extend, and the effect would be to bring a charge upon persons who are not rated inhabitants at the time the charge was incurred. This is different from an order on relations, because those relations are liable on a permanent ground, and not, like inhabitants, in respect of a fluctuating liability. It is unnecessary to hold that the magistrates have a power of making a retrospective rate. Where a pauper is sent to an asylum, the order for sending him there may be accompanied with an order of maintenance. The question is between the county and the parish. The lunatic pauper may be received without an order; but where there is no order the asylum is not bound to receive him. There is, therefore, no necessity for such an authority, and it is not distinctly given. I therefore think that so much of the order as relates to the by-gone maintenance is bad.

BAYLEY, J.—The adjudication is by recital only. This is not the correct form. It does not refer to a previous adjudication. But if it is so treated by the justices and by the parties, we are concluded. The magistrates had no right to make a retrospective charge on the parish; so a

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retrospective rate is bad (*a*). The asylum was under no obligation to receive unless there were an order from two justices. In that case there is a provision in the act. The other case is, where the settlement cannot be ascertained. That provision is useful in this respect, that it will make the county active to discover the place of settlement.

HOLROYD, J., and LITTLEDALE, J., concurred.

Orders quashed as to the past expenses (10*l.* 16*s.*,) and confirmed as to the residue.

(*a*) *Tawney's* case, 2 Ld. Raym. 1009; *Rex* v. *Wavill*, Dougl. 116.

The KING, on the Prosecution of FRANCIS FULLER, Esq. *v.* BRADLEY.

The defendant in an information for a libel may prove the truth of the matters alleged to be false and libellous.—*Semble.*

THIS was an information filed against the defendant for a libel, in which he charged the prosecutor, in very opprobrious terms, with having signed at Paris a commission purporting to have been signed at Jamaica. The defendant having been found guilty at the sittings after Michaelmas term, 1827, before Lord *Tenterden*, C. J., the judgment of the Court was now prayed by Sir *J. Scarlett* and *H. Bosanquet*. The defendant spoke in person in mitigation of punishment, and, having gone into much irrelevant matter, was advised by the Court to argue upon the ground of his having been in error in making the charge against the prosecutor; saying, that they could not allow him to urge the truth of the charge, and shew that the commission was a forgery; that he ought not to be permitted to make this charge now, after having been put to fair proof of it at the trial. The sentence of the Court was, that the defendant should be imprisoned, in the custody of the marshal, for the space of

four calendar months, and, at the expiration of that period, should enter into a recognizance for his good behaviour, himself in the penalty of 500*l.*, with two sureties in the sum of 100*l.* each, and that he should be further imprisoned until such security should be given.

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HENLEY *v.* SOPER.

DEBT upon a decree of the Supreme Court of Newfoundland. At the trial before *Littledale*, J., at the last assizes for the county of Devon (*a*), it appeared that the plaintiff and defendant had entered into partnership at Plymouth to carry on business in Newfoundland. A petition was presented by the plaintiff to dissolve the partnership and for an account. Without any answer being put in, the matter of the petition was, by the authority of the Court, referred to two arbitrators, appointed by the parties, and an umpire or third arbitrator named by the Court. An award was made, finding the defendant indebted in 1,000*l.* This award was set aside by the Court. A second award found the defendant indebted in 608*l.*; and judgment was given for the plaintiff for that amount, on which judgment or decree the present action was founded. In support of his case, the plaintiff gave in evidence the following exemplification of the judgment declared on:—

An action will lie upon the decree of a colonial court of equity for the balance of an account between partners. In such action, the Court will look at the substance, without regarding the form of the proceedings upon which the decree is founded.

"To all to whom these presents shall come, I, the Honourable *Edward Brabazon Brenton*, acting chief judge of the Supreme Court of Newfoundland, do hereby certify that the paper writings which are hereunto annexed, consisting of 11 folios, and marked 'E. B. B.' No. 1, No. 2, No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, No. 10, and No. 11, contain a true and correct transcript of the record of the said Supreme Court, and of the exhibits therein pro-

(*a*) Counsel for the plaintiff, *Merewether*, Serjt, and *Follett*; for the defendant, *Wilde*, Serjt., and *Bayly*.

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duced, admitted, and proved in a certain cause then tried and determined, when *Samuel Henley* was the plaintiff and *Joseph Soper* was the defendant, as by the record thereof there remaining will more fully appear.

In witness whereof, I, the said acting chief judge, have hereunto set my hand, and caused the seal of the Supreme Court of Newfoundland to (L. S.) be hereunto affixed. Dated at St. John's, in the said island, this 21st day of December, in the year of our Lord 1827.

E. B. BRENTON,
Acting Chief Justice."

In the Supreme Court of St. John's, Newfoundland, 4th June, 1825.

Henley v. *Soper.* On this day a memorial was presented to the Court by Mr. *Samuel Henley*, of which the following is a copy:—

"To the Honourable RICHARD ALEXANDER TUCKER, Esq., Chief Justice of Newfoundland, &c. &c.

"The petition of *Samuel Henley* humbly sheweth, that in the year 1818 your petitioner entered into partnership with *Joseph Soper*, of Plymouth, Devon, to carry on business as merchants to Newfoundland, which they afterwards extended to the Labrador. That they accordingly purchased a vessel and sundry articles of merchandize; took premises and carried on business, which was conducted here and at the Labrador by your petitioner, who had made considerable advances, under the firm of *Soper* and *Henley*, until the year 1821, when your petitioner being in Newfoundland and his said partner in England, it was proposed to your petitioner, by letter from his said partner, to close the same, (to which your petitioner consented,) his said partner having appointed Mr. *John Rendle*, of this town, to act in his behalf.

"That your petitioner, being at that time in bad health, agreed that the property and outstanding debts of the said

firm should be realized by the said *John Rendle;* hearing that the vessel belonging to the said partnership was employed in other voyages by the said partner, and not sending the said vessel in the same trade she was employed in by the said copartnership, which said vessel was kept out of the trade until totally lost.

"That his said partner had orders from your petitioner, and always did keep the said vessel insured, your petitioner's part valued in 500*l.*, for which your petitioner cannot get any satisfaction. That his said partner, *Joseph Soper*, has, and still does continue to carry on the business at Labrador, on his own separate account, being represented there by his son, who is now in this town.

[No. 1. E. B. B.]

"That the said *John Rendle*, having handed over the books of the said late firm, (as your memorialist is informed,) together with all the balances in his hands, to the son of the said *Joseph Soper*, agent to his father, your petitioner has not since been able to procure any accounts of the affairs of the said partnership, although he hath frequently applied for the same to the said *John Rendle*, as well as the said *Joseph Soper*, although there is, as he verily believes, a considerable balance due on the partnership account. Your petitioner, therefore, humbly prays, that your Honour will be pleased to order the said *Joseph Soper* to furnish him with a true statement of the accounts of the said co-partnership.

SAMUEL HENLEY."

St. John's, Newfoundland,
June 4, 1825.

Upon which memorial the Court made the following order:—

"Let *Joseph Soper* appear in the Supreme Court on

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Monday next, the 6th of this present month of June, to answer such questions as may be proposed to him, touching the several matters set forth in the foregoing memorial.

By the Court.

JAMES BLAIKIE, *C. S. C.*"

Supreme Court,
June 4, 1825.

Supreme Court, June 13, 1825.

Samuel Henley v. *Joseph Soper.* } *Joseph Soper*, jun., as the attorney of his father *Joseph Soper*, the elder, appeared in Court, and stated that he had it not in his power to answer the charges stated in the plaintiff's memorial; in consequence of which, the cause was ordered to stand over until the month of November next, to allow the defendant time to produce a statement of the late partnership accounts between the plaintiff and the defendant.

[No. 2. E. B. B.]

In the Supreme Court, St. John's, Newfoundland, December 6, 1825.

In the cause between { *Samuel Henley*, plaintiff, v. *Joseph Soper*, defendant.

On this day the above-named plaintiff, in his own proper person, and the defendant, by his attorney *Joseph Soper*, jun., prayed the Court that all matters in difference between them might be submitted to the arbitration of Messrs. *Patrick Thue* and *John Boyd*, that the Court would be pleased to appoint an umpire, and that the award of the said arbitrators, signed and delivered into Court, might be made a rule of the Supreme Court, and be considered final and binding on them the said *Samuel Henley* and *Joseph Soper*.

To which prayer the Court assented, and Mr. *Peter Le Mesurier* was by the Court appointed umpire accordingly.

Supreme Court of Newfoundland, April Term, 1826.—*April* 19.

The Hon. RICHARD ALEXANDER TUCKER, Esq., *Chief Judge.*

The Hon. JOHN WILLIAM MOLLOY, Esq., and the Hon. AUGUSTUS WALLET DES BARRES, Esq., *Assistant Judges.*

Henley v. *Soper.* On motion of the attorney-general the Court stated that the judgment on the award of arbitrators in this cause would be given on the 26th inst. (A cause from former Court).

Supreme Court of Newfoundland, July 12, 1826.

This day the second term of the Supreme Court commenced, before

The Hon. RICHARD ALEXANDER TUCKER, Esq., *Chief Judge.*

The Hon. JOHN WILLIAM MOLLOY, Esq., and the Hon. AUGUSTUS WALLET DES BARRES, Esq., *Assistant Judges.*

Henley v. *Soper.* The award made by the arbitrators in this case was set aside; and the arbitrators were authorized to enter into a new investigation of the accounts between the parties, upon Mr. *Soper's* paying all the costs already incurred in this proceeding.

[No. 3. E. B. B.]

Supreme Court of Newfoundland, July 27, 1826.

Henley v. *Soper.* The new award in this case was lodged in Court.

Supreme Court of Newfoundland, July 31. 1826.

Henley v. *Soper.* The attorney-general moved for judgment on the award, which was not opposed by Mr. *Lilly*, attorney for the defendant. The Court gave judgment for the plaintiff for amount of the award, six hundred and eight pounds and two-pence sterling.

1823.

HENLEY v. SOPER.

In the cause between { *Samuel Henley*, plaintiff, v. *Joseph Soper*, defendant.

The following is a true copy of the several exhibits in Court in the said cause, which were either duly proved or admitted in Court, viz.:—

"MR. SAMUEL HENLEY,

Plymouth, April 9, 1821.

Sir,

Your general conduct for the last year, as respects our joint concerns in the Devon and the fishery connected with the said vessel, has been such as compels me to determine on dissolving our connections. I have accordingly embraced the earliest opportunity of writing you from hence, to give you notice thereof. You must, therefore, consider this is as such; and that from the conclusion of the fishing voyage the last season our connection entirely ceases, and that nothing more now remains to be done but to close our concerns with the least possible delay.

"In order to facilitate this object, I have given my son a *power of attorney to act on my behalf, with authority to appoint any other person as he may see fit,*

[No. 4. E. B. B.]

and I trust you will be equally disposed to wind up a concern which cannot be carried on for the interest or advantage of either party. I shall defer stating the ground of my dissatisfaction till you return to England, when I shall be ready to settle all our affairs, I hope, to our mutual satisfaction.

"I regret to say, I have been compelled to refuse most of your drafts. Annexed you have a copy of those presented and what paid; you must, therefore, calculate on their being returned dishonoured, with expenses, and provide for them accordingly, by making sale of so much fish and oil as will pay the amount of those which relate to debts contracted for the use of the Devon. This step, I think, you must have anticipated; at least I consider, if you thought

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proper to remain in the country and retain the whole produce of the voyage, you should have provided a moiety of the amount of bills drawn and remitted me, in order to cover your proportion. The residue of the property, after payment of all debts due by us as joint owners of the Devon, must be sold or divided, as you and my representative may see most advantageous to our interest. The Devon, I am sorry to say, made a most disastrous voyage to Oporto, in the longitude of the Western Islands. She met with dreadful gales of wind and bad weather, by which the vessel suffered considerably; threw about 200 quintals of fish overboard; damaged very much 400 or 500 quintals more; and the residue of the cargo more or less injured. The average has not been adjusted; nor have I yet received any documents or remittance for freight, nor do I think we shall have any, or but little, to receive. The Devon loaded wines for Cork and Dublin, (very low freight). At both places she has delivered her wines. I have ordered her to Newport for coals, and proceed therewith to Plymouth, where I shall lay the vessel up till you return to England. I have candidly pointed out to you my determination, and therefore trust no difficulty or impediment will be thrown in the way by you to an amicable adjustment of all our concerns at Newfoundland, &c., and the moment

[No. 5. E. B. B.]

you return home you will find me prepared to make a final arrangement and settlement of all things between us. In the mean time, I remain, &c.

JOSEPH SOPER.

" Bills drawn.

No. 1, in favour of *William Ford*, 14*l*. 11*s*.

Then follow 12 other bills, making a total of 156*l*. 18*s*. 1*d*.

" Bills paid.

No. 1, *William Ford*, 14*l*. 11*s*.

Then follow five other bills, making a total of 43*l*. 10*s*. 1*d*.

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"Amount of bills drawn	£156	18	1
Amount of bills paid	43	10	1
Amount of bills unpaid . . .	£113	8	0

Addressed to
Mr. *Samuel Henley*,
St. John's, Newfoundland."

"To the Hon. RICHARD A. TUCKER, Chief Justice of the Island of Newfoundland.

"The Memorial of *Joseph Soper* humbly sheweth,

"That, in the month of June last past, your memorialist was directed by the Supreme Court to furnish *Samuel Henley*, who had been some time a partner with your memorialist in a fishing establishment on the coasts of Labrador, with a statement of the accounts subsisting between the said *Henley* and your memorialist. That, accordingly, the accounts were made up from the time that the said *Henley* was last in England, and have been furnished him. That the said *Henley*, about ten days since, furnished your memorialist

[No. 6. E. B. B.]

with a statement of his accounts, from the very commencement of the co-partnership transactions, which your memorialist is not prepared to go into, not having the least idea that your memorialist would have met accounts which had been closed between the parties in the spring of 1820, when the said *Henley* was in England.

"Your memorialist therefore prays that your honors will allow him time to procure the whole of the accounts, without which your memorialist cannot meet the said *Henley* by arbitration.

"And in duty bound will ever pray.

JOSEPH SOPER."

St. John's, Newfoundland,
30th November, 1825.

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"We, the undersigned *John Boyd, Patrick Huie,* and *Peter Le Mesurier,* of St. John's, Newfoundland, having been duly appointed and chosen as arbitrators under a rule of the Supreme Court of this island, in a case some time pending therein between *Samuel Henley,* of St. John's aforesaid, of the one part, and *Joseph Soper,* of Plymouth in Great Britain, of the other part, touching certain differences in accounts arising from a copartnership business, carried on mutually between the said parties on the coast of Labrador, in the years 1818, 1819, 1820, and 1821, under the firm of *Soper* and *Henley,* have, after many meetings, to which the parties concerned or their attorneys were cited, and as full an investigation into the matters in dispute as the nature of things would admit of, at length come to an unanimous agreement in this complex business as follows:—That we the said arbitrators do find, arbitrate and award the said *Joseph Soper* to be justly and truly indebted to the said *Samuel Henley* in the sum of 1133*l.* 12*s.* 5*d.* sterling money; reserving, however, to the said *Joseph Soper* to produce accounts (if any he has) within such time as the Court may direct between the 1st day of April, 1819, and the 16th day of March, 1820, at the former of which dates he furnishes an account closed by a balance in favour of *Henley* of 196*l.* 1*s.* 1*d.*, and the next account from him, as far as has come before us, commences at the latter date, say 16th March, 1820, in which the first item is a balance to the debit of *Henley* of 212*l.* 9*s.* 4*d.*; the sum of these differences, say 408*l.* 16*s.* 5*d.* sterling, to be the limits of any future discussion, leaving a decided sum of 725*l.* 2*s.* sterling to be paid by the said *Joseph Soper* to the said *Samuel Henley.* And we the aforesaid arbitrators do further award and decide that all expenses attending this cause of arbitration be borne mutually between the two contending parties, each one half. The charge made by the arbitrators for their trouble being 31*l.* 10*s.* sterling, to be equally divided amongst them, say 10*l.* 10*s.* sterling each.

"Given under our hands at St. John's, Newfoundland,

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this 21st day of January, one thousand eight hundred and twenty-six.

J. BOYD.
PAT. HUIE.
PET. LE MESURIER."

"St. John's, Newfoundland, 26th July, 1826.

"We the undersigned arbitrators and umpire, appointed to investigate, average and adjust matters of account, and other differences, subsisting between *Samuel Henley* and *Joseph Soper* the elder, touching their late partnership concerns, after having carefully and attentively heard the allegations of the parties, and inspected the accounts and other documents laid before us, as also examined persons on oath respecting the said matters in dispute, do award, determine and adjudge that *Joseph Soper* the elder is justly indebted to *Samuel Henley* in the sum of 608*l.* 0*s.* 2*d.* sterling.

PAT. HUIE, }
J. BOYD, } *Arbitrators.*
PET. LE MESURIER, *Umpire.*"

"*In the Supreme Court, Newfoundland.*

Samuel Henley v. *Joseph Soper.* } *Samuel Henley*, of St. John's, Newfoundland, mariner, the plaintiff in this cause, maketh oath and saith, that he hath paid to the arbitrators appointed for adjusting the said cause the sum of 18*l.* 18*s.* sterling, and to *John Perkins*, for the hire of rooms occupied by the said arbitrators in adjusting the same, 2*l.* 2*s.* 11*d.* sterling. And this deponent further saith, that in preparing and arranging the partnership accounts between deponent and the said defendant, he was necessarily obliged to employ an accountant, and that accordingly he did so employ *George Burton*, of St. John's aforesaid, accountant; and that the said *George Burton*, for arranging, preparing and adjusting the said accounts, and for his attendance on the arbitrators to explain

the same, hath an account against deponent for 26*l.* sterling; and that out of the said sum of 26*l.* he hath paid the said *George Burton* 6*l.* 11*s.* 9*d.* sterling, but is unable to pay the remainder for want of funds, but hath accepted an order for the balance thereof. And this deponent further saith that the Clerk of this Court hath an account against him for 2*l.* 2*s.* sterling, for his fees in the said cause, which he is also unable to pay for want of funds.

SAMUEL HENLEY.

Sworn at St. John's, Newfoundland, 2d July, 1827, before

JAMES BLAIKIE, *Acting C. S. C.*"

[No. 9. E. B. B.]

"*In the Supreme Court of Newfoundland.*
Samuel Henley v. *Joseph Soper.*
Plaintiff's bill of costs.

	£	s.	d.
Paid *George Burton* for examining and preparing the accounts, and his attendance to explain and arrange the same, under the directions of the arbitrators	26	0	0
Paid the arbitrators (second award)	18	18	0
Paid *John Perkins* for hire of room for arbitrators	2	2	11
Paid attorney's fees	10	10	0
Paid *Geo. Wm. Busteed*, clerk of Supreme Court, for transcript of the case	2	2	0
	59	12	11
By the Judges, deducted from attorney's fees .	2	3	0
	£56	9	11

Let the defendant's attorney in Court attend in the Judges' Chambers to-morrow, at 12 o'clock in the forenoon, to shew cause why the several charges contained in the foregoing accounts should not be taxed and allowed to the plaintiff.

By order.

JAMES BLAIKIE, *Acting C. S. C.*"

"Judges' Chambers,
4th July, 1827."

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"Judges' Chambers, 5th July, 1827.

"Upon hearing of the parties, the Judges of the Supreme Court do tax the plaintiffs costs at the sum of 56*l.* 9*s.* 11*d.* sterling. By order.

JAMES BLAIKIE, *Acting C. S. C.*"

[No. 10. E. B. B.]

"George the Fourth, by the grace of God of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, &c. &c.

To the Sheriff of Newfoundland and his deputy and deputies, greeting.

We command you that of the goods and chattels of *Joseph Soper*, within your bailiwick, you cause to be made a certain debt of 608*l.* 0*s.* 2*d*, sterling, which *Samuel Henley*, lately in our Supreme Court before us at St. John's, recovered against him; also 56*l.* 9*s.* 11*d.* sterling, which in our same Court before us, at St. John's aforesaid, were adjudged to the said *Samuel Henley*, for his damages which he has sustained as well on occasion of the detention of the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said *Joseph Soper* is convicted, as appears to us of record: and have that money before us at St. John's the 19th day of July instant, to be rendered to the said *Samuel Henley* for his debt and damages aforesaid; and have then there this writ.

Witness, the Hon. RICHARD ALEXANDER TUCKER, Esq. our Chief Judge of our Supreme Court of Newfoundland, this 6th day of July, in the eighth year of our reign.

By the Court.

JAMES BLAIKIE, *Acting C. S. C.*"

"The within named *Joseph Soper* hath not any goods or chattels in my bailiwick, whereof I can cause to be levied the debt and damages within mentioned, or any part thereof.

A. HOGSETT, *D. Sheriff.*"

"19th July, 1827."

[No. 11. E. B. B.]

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Upon this evidence it was objected that this judgment being in the nature of a decree of a court of equity, would not raise an assumpsit, and that the authority of the defendant's son was not sufficient to support the award on which the decree was founded. These objections being overruled by the learned Judge, a verdict was found for the plaintiff.

Wilde, Serjt. now moved to enter a nonsuit. In *Carpenter* v. *Thornton* (*a*) it was held that an action at law would not lie upon a decree for a specific sum of money, founded on equitable considerations. A foreign judgment is only *primâ facie* evidence of a demand, the grounds of which the Courts may look into. Now here it does not appear that the reference upon which the judgment proceeds was with consent of parties. [*Bayley*, J. The Court does not set aside the first award absolutely: must it not be taken to have been by consent?] This document, which is called a judgment, must be looked at not as a judgment founded on an award, but as a decree ordering the payment of the balance of a partnership account. It was immaterial through whose agency the balance was obtained. It is very doubtful whether there was any authority to refer at all. The power of attorney was not produced, though it was proved out of the mouth of the party that such a power existed. It no otherwise appeared than by the letters. By appointing an arbitrator, the defendant's son created a greater power than he himself possessed; an irrevocable power of binding the principal at all events. The power of attorney does not constitute the son an agent for such a purpose. A person is not permitted to acknowledge his own deed in Court. *Johnson* v. *Mason* (*b*).

Lord TENTERDEN, C. J.—I think this verdict is right. This is an action founded upon the decree of a colonial court, which, in substance, was given for the balance of an

(*a*) 3 B. & A. 52.

(*b*) 1 Esp. N.P.C. 89. And see *Absalom* v. *Anderton*, 3 Leonard, 84; *Call* v. *Dunning*, 4 East, 53.

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HENLEY v. SOPER.

account. There is a great difference between colonial courts and the courts of this country. The former cannot enforce their own decrees here. A court of equity in this country can enforce its decrees, and therefore requires no interference of courts at law. There is also a great difference in the course of proceedings between the colonial courts and the courts of this country. In the colonial courts a party must make out the substance of his claim, but is not tied down to matters of form. So in proceedings before the Privy Council. Not one colonial judgment in fifty would stand if strict regularity in the proceedings were required. In *Carpenter* v. *Thornton* the Court expressed itself with a good deal of caution. The judgment of the Court there was founded on the special circumstances of the case: there was no definite sum there. We did not say that an action would not lie where the subject-matter of the judgment was not cognizable in our courts of law. If a partnership account is settled, and a balance ascertained, an action will lie (*a*). This was a proceeding on a petition to dissolve a partnership. The first award could not be set aside without the consent of the parties.

BAYLEY, J.—I am of the same opinion. The case of *Carpenter* v. *Thornton* does not decide anything here. There can be no doubt that if partners choose to settle the account between themselves, an action will lie. Can it make any difference that it is settled by the authority of a court?

HOLROYD, J., and LITTLEDALE, J., concurred.

Rule refused.

(*a*) *Foster* v. *Allanson*, 2 T. R. 479; *Ruckstraw* v. *Imber*, Holt, N. P. C. 368.

1828.

BOWEN and others *v.* FOX and others.

THIS was an action upon the case for an alleged wrongful disposal, by the defendants, of the certificate of the registry of a ship belonging to the plaintiffs. The pleadings were special; but it is unnecessary to set them out, the only question before the Court being whether a certain document, tendered in evidence on the part of the plaintiffs, was or was not admissible without an agreement stamp. The cause was tried before *Gaselee*, J., at the last assizes for the county of Cornwall(*a*), when the case was this. The plaintiffs were merchants in London, and owners, and one of them captain of the brig Gratitude, of that port. The defendants were merchants at Falmouth. In February, 1824, the brig put into Falmouth in distress, and the captain, being in want of money, applied to the defendants for an advance, proposing to deposit with them, as a security, the certificate of the brig's registry. In order to prove this part of the case, the following letter, signed by one of the plaintiffs, the captain of the brig, and addressed to the defendants, was tendered in evidence:—

"Messrs. *G. C.* & *R. W. Fox* & Co.—Gentlemen,—You will be pleased to receive the register of the brig Gratitude, which I inclose, and which I lodge in your hands as a security for the payment of all demands and charges on account of the said vessel, since she has been in this port, and which I hope will be satisfactory to you: the cost and expense on account of my being arrested, please to state the same, and charge to my account. *John Bowen.*"

It was objected, on the part of the defendants, that this letter amounted to an agreement, and required an agreement stamp, which it had not. The learned Judge being of that opinion, rejected the letter, and the plaintiffs, not being able without it to launch their case, were nonsuited.

"You will be pleased to receive the register of the brig Gratitude, which I inclose, and which I lodge in your hands as a security for the payment of all demands and charges on account of the said vessel, since she has been in this port, and which I hope will be satisfactory to you," is not receivable in evidence, in an action by the writer to recover possession of the register, without an agreement stamp.

(*a*) Counsel for the plaintiff, *Merewether*, Serjt, and *Coleridge*; for the defendant, *Wilde*, Serjt., and *Follett*.

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BOWEN v. FOX.

Merewether, Serjt., moved for a rule nisi to set aside the nonsuit, and for a new trial. The letter in question did not amount to an agreement, and was admissible in evidence without a stamp. It could not have been declared upon as an agreement between the parties, for it was signed by only one of them. In *Edgar* v. *Blick* (*a*) it was held that the plaintiff, having signified by a printed prospectus the terms on which he undertook to introduce applicants to partnerships or situations, might, in an action against one who had employed him for those purposes under a parol agreement, read the printed prospectus to shew what the terms were, although it was not stamped. And in *Drant* v. *Browne* (*b*), where a proposal was made in writing by the plaintiff to let a piece of land to the defendant on certain terms contained in a written agreement previously made between the plaintiff and a third person; and the plaintiff afterwards agreed by parol that the defendant should have the land upon the terms proposed; it was held, in an action for the breach of the agreement, that the original proposal was receivable in evidence without a stamp. Upon these authorities it is submitted that the document in this case was receivable.

Lord TENTERDEN, C. J.—Both the cases cited are distinguishable from the present. In the first, Lord *Ellenborough* admitted the prospectus *because* it was "not evidence of the agreement itself, but had performed its office before the parol agreement was entered into;" and in the latter the agreement between the plaintiff and the third party was produced properly stamped, and the plaintiff's case was made out, independently of the unstamped document. Here the letter in question was the only evidence of the terms upon which the certificate was to be deposited with the defendants, which forms an essential

(*a*) 1 Stark. N. P. C. 464. But see *Williams* v. *Stoughton*, 2 Stark. N. P. C. 202.

(*b*) 5 D. & R. 582; 3 B. & C. 665.

distinction. I am of opinion that the learned Judge was right in considering the letter inadmissible without an agreement stamp, and therefore that we ought not to grant the rule prayed for.

1828.

BOWEN v. FOX.

The other Judges concurred.

Rule refused (*a*).

(*a*) See *Meering* v. *Duke*, *ante*, 121, and the cases there cited.

LADY LE FLEMING *v.* SIMPSON.

Copyhold tenants are incompetent witnesses to prove a right within the manor for the copyholders to take timber for repairs.

UPON the second (*a*) trial of this cause at the last assizes for the county of Westmoreland (*b*), before *Hullock*, B., in order to shew a customary right in the manor for the customary tenants to take timber for repairs without the assignment of the lord, the defendant's counsel proposed to call customary tenants of the same manor to support the alleged right. But it being objected that the witnesses tendered were incompetent on the score of interest, their evidence was rejected, and a verdict was found for the plaintiff.

Blackburne now moved for a new trial, contending that the evidence of the customary tenants had been improperly rejected. The witnesses were not liable for the costs of the action, and were therefore not interested in the event of the suit. Nor could this record have been used for or against them. [Lord *Tenterden*, C. J. That would be so upon reading the record alone; but the generality of the record might be explained by parol. *Littledale*, J. If it had been pleaded that all customary tenants have the right,

(*a*) See the account of the proceedings on the first trial, *ante*, vol. i. 269.

(*b*) Counsel for the plaintiff, *Courtney* and *Aglionby*; for the defendant, *Blackburne* and *T. Clarkson*.

1838.

LADY LE FLEMING v. SIMPSON.

you admit that the witnesses would have been incompetent. *Holroyd*, J. In tenant-right estates the freehold is in the lord. Lord *Tenterden*, C. J. If the estate passes by surrender, it must be taken that the freehold is in the lord.]

Rule refused (*a*).

(*a*) As to the customary freehold tenure, *vide ante*, vol. i. 269 (*c*).

CARDEN, Widow, *v.* BURFORD.

Where an exclusive jurisdiction is given to a Court of Requests over debts not exceeding 5*l.*, with an exception of actions for the balance of an account originally exceeding that sum, a party who sells several articles which the vendee treats as forming parts of one account, may sue in the superior Courts, though all the items of the account have been satisfied except the last, which does not amount to 5*l.*

ASSUMPSIT for goods sold and delivered. The particulars of the plaintiff's demand delivered under a judge's order were 46*l.* 10*s.* for the value of ten loads of hay, and 2*l.* 4*s.* for expenses paid by the plaintiff in respect of a summons of the Court of Requests against the defendant. The plaintiff's attorney verbally stated at the time these particulars were delivered, that the plaintiff was seeking to recover the value only of one load of hay which was unpaid for, amounting to 4*l.* 14*s.*, and the expenses occasioned by the summons. The defendant having suffered judgment by default, a writ of inquiry was executed, when the damages were assessed at 4*l.* 11*s.* 9*d.*, as the value of the one load of hay. By 5 *Geo.* 3, c. 8, intituled, "An Act for the more easy and speedy Recovery of Small Debts within the Hundreds of Blackheath, of Bromley and Beckenham, of Rokesley otherwise Ruxley, and of Little and Less-Ness, in the County of Kent," a court of justice is constituted by the name of "The Court of Requests for the Hundreds of Blackheath, Bromley, and Beckenham, of Rokesley otherwise Ruxley, and of Little and Less-Ness, in the County of Kent," giving power and authority to commissioners to hear and determine causes where the debt or debts do not exceed 40*s.* By 47 *Geo.* 3, c. 4, the jurisdiction is extended to debts not exceeding 5*l.*; and it is enacted, that if any action or suit shall be commenced

in any of his majesty's courts of record at Westminster, for any debt not exceeding 5*l.*, and recoverable by virtue of those acts in the said Court of Requests, then and in every such case the plaintiff or plaintiffs in such action or suit shall not, by reason of a verdict for him, her, or them, or otherwise, have or be entitled to any costs whatsoever. Both the plaintiff and the defendant, at the time of the commencement of the action, resided within the jurisdiction of the Court of Requests, and the defendant was liable to be summoned thereto. Early in this term, *Campbell*, for the defendant, obtained a rule, calling upon the plaintiff to shew cause why, upon payment of the sum of 4*l.* 11*s.* 9*d.*, the amount of the damages in this cause, without costs, all proceedings should not be stayed, with a stay of proceedings in the mean time. The plaintiff's affidavits, in answer to this application, disclosed the following facts:—*Jones*, the manager of the plaintiff's farm, applied to the defendant, in January last, for payment of the balance of the account for hay, when defendant said to *Jones* that it would be better for him to apply to the commissioners of the Court of Requests at Greenwich for a summons against him the defendant, and stating that such proceeding would be the least expensive mode of settling the matter in dispute between the plaintiff and the defendant. *Jones* accordingly obtained a summons, which the defendant neglected to attend; whereupon the commissioners issued an order for his attendance. The defendant, having attended in obedience to this order, told the commissioners that they could not take cognizance of the debt, as it was the balance of an account amounting to 46*l.* This objection being persisted in, the commissioners declined to interfere. At the execution of the writ of inquiry the delivery of each of the tons of hay was contested by the defendant, and proved by the plaintiff.

Busby for the plaintiff. By the 13th section of the statute, actions for the balance of an account where the

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debt originally exceeded 5*l.*, are expressly excepted. At the execution of this writ of inquiry the plaintiff proved the full amount of her demand, and the defendant was permitted not only to give evidence of payments, but even to prove a set-off, in reduction of the plaintiff's claim. Having taken the objection before the commissioners, it is most unreasonable that he should now turn round and insist that the Court of Requests was the only proper tribunal.

Campbell, contrà. This is not an action for the balance of an account, but for the price of one load of hay, the value of which did not exceed 5*l.* When the defendant made the statement in the Court of Requests, there was nothing to shew but that the action might have been for the balance of an account. But in this Court the action is specifically brought for the price of one load only.

Lord TENTERDEN, C. J.—Upon all the evidence this action was brought for the balance of an account.

Rule discharged with costs (*a*).

(*a*) And see *Porter* v. *Philpot*, 14 East, 344; *Harsant* v. *Larkin*, 3 B. & B. 257; *Cornforth* v. *Lowcock*, *ante*, vol. i. 321.

The KING *v.* The Inhabitants of USKE.

Where an appeal against an order of removal is adjourned on the ground of the justices being equally divided, this Court will not grant a *certiorari*, for the purpose of quashing the order of removal and the order of adjournment, upon affidavits shewing that the apparent equality of votes was occasioned by the vote of a magistrate who was a rated inhabitant of the respondent parish, and had joined in making the order of removal.

TWO justices, *T. A. W.* and *J. B. D.*, by their order, removed *James Lewis*, his wife and family, from the town of Uske, in the county of Monmouth, to the parish of Llangwm Usha, in the same county. An appeal against this order, by the parish of Llangwm Usha, came on for hearing at the Easter sessions, 1827, at which *J. B. D.*

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presided as chairman. The Court being, with the exception of *J. B. D.*, unanimously of opinion that the respondents had failed in proving a settlement in the parish of Llangwm Usha, quashed the order; but on the application of respondent's counsel, and at the request of the chairman (*a*), reserved a case for the opinion of this Court. *J. B. D.* was a rated inhabitant of Uske. The case so reserved was by this Court sent back to the Court of Quarter Sessions, and the appeal was re-heard at the last Epiphany sessions, when the appellants admitted a *primâ facie* settlement in their parish (Llangwm Usha), and relied upon a subsequent settlement in Uske. Upon this occasion *J. B. D.* and three other magistrates were present, and the Court being equally divided, the case was adjourned to the following (Easter) sessions. Before these sessions arrived (*b*), the appellants obtained a rule nisi for a *certiorari* to remove into this Court the original order of removal, and all orders of sessions made thereon, "in order that the order of removal, and also an order of sessions for adjourning the hearing of the appeal against the same order, may be quashed." At the Easter sessions the appellants, resting upon their rule nisi for a *certiorari*, refused to enter upon the case, and the order of removal was confirmed.

Russell, Serjt., and *Watson*, now shewed cause against the rule. In *The King* v. *Yarpole* (*c*), it was decided that justices rated to the relief of the poor, and either of two contending parties, have no right to vote. But in *The King* v. *The Justices of Leicestershire* (*d*), the Court refused to grant a *mandamus* to the justices at sessions to re-hear an appeal against an order of removal, after judgment given by them and entered by the clerk of the peace, upon the ground that the justices were equally divided, and that the judgment was entered by mistake, instead of an adjournment of the appeal. So, in *The King* v. *The Justices of*

(*a*) *Rex* v. *Gudderidge*, cited *post*, 174.

(*b*) H. T. 1828

(*c*) 4 T. R. 71.

(*d*) 1 M. & S. 442.

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Monmouthshire (*a*), a *mandamus* was refused, where, upon an appeal against an order of removal, the justices were equally divided upon a question of fact, but the Court of Quarter Sessions, thinking that it lay on the respondents to establish their case to the satisfaction of a majority of the Court, quashed the order. So here the Court will not interfere. Even in *The King* v. *Yarpole*, the Court said they could not interfere with an original order. That part of the rule, therefore, cannot be made absolute.

Campbell and *Maule*, contrà. It is not meant to be contended that this Court sits as a court of error upon appeal cases; but here the Court of Quarter Sessions acted without jurisdiction, as well as contrary to all law and justice. [Lord *Tenterden*, C. J. They had jurisdiction to adjourn.] It is submitted that they had not, and that the case must be considered as if *J. B. D.* had not been present, his vote being doubly bad, as the removing magistrate, and a rated inhabitant of Uske. [Lord *Tenterden*, C. J. How can we inquire whether the order for the adjournment was properly made?] In the *Foxham* tithing case (*b*), an order of sessions was quashed because it concerned one of the justices who joined in making the order, and whose name appeared in the caption; and in *The King* v. *Gudderidge* (*c*), it was held that a rated inhabitant could not vote either on the decision of an appeal or on an application for a case for the opinion of the Court. That case also shews that the Court has power to inquire into these matters by affidavit. By the principles of the common law, an interested party would have no power to vote; and the statute of 16 *Geo.* 2, c. 18, removes the disability only in certain cases. The order was therefore, in fact, quashed, and the clerk ought so to have entered it. If ten to one had voted in favour of quashing the order, and it had been so entered, and the Court had afterwards ad-

(*a*) 7 D. & R. 334; 4 B. & C. 844.

(*b*) 2 Salk. 607.

(*c*) 8 D. & R. 217; 5 B. & C. 459.

journed the appeal, such an adjournment would have been void. Then it is immaterial whether the clerk went through the form of making the entry, and it may be made *nunc pro tunc*. The identity of the party interested could never appear upon the face of the proceedings, that must be supplied by averment. So if the party voting were no justice. In this case, as in that before Lord *Holt* (*a*), the name of *J. B. D.* ought to appear in the caption. In *The King* v. *Yarpole*, the difficulty was, that the Court then supposed that it had no authority to quash an order; but the case would not be considered now as law in that respect.

Lord TENTERDEN, C. J.—This rule must be discharged. I do not intend to give any sanction to a magistrate's voting in cases where he has a personal interest—such a course is not consistent with the due administration of justice. The ground of the present application is, that the Court were divided in fact, but that in law two voted against one. It has been determined that this Court cannot take upon itself the functions of a court of error. It has been argued that the Court had no jurisdiction to adjourn. This argument assumes that there had been a previous order to quash the order of removal; no such order had been made, in point of fact; but it is insisted that such an order ought to have been made. It is said, that in *The King* v. *Gudderidge* this Court did interfere; but there we interfered, not to remove the proceedings, but to quash our own writ. The question there was, whether our own writ should stand; and we could not allow it to remove an order under such circumstances.

The other Judges concurred.

Rule discharged, without costs.

(*a*) *Foxham* tithing case, *ubi suprà*.

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DANCASTER v. HEWSON.

Statement in declaration, "I will do my best to transport him, *as* he has been working for me some time, and has been robbing me all the while." Proof, "He has worked for me some time, and has been continually robbing me;"—Held, no variance.

A. obtains a warrant to search the house of *B.* for goods suspected to be stolen, and in accompanying the officer to execute the warrant, tells him that *B.* has robbed him:—Held, not a privileged communication.

CASE. The declaration stated, that the plaintiff being a person of good character, &c. defendant, contriving to injure plaintiff, and to cause it to be suspected and believed that plaintiff had been guilty of theft, and to subject him to the pains, &c. in a certain discourse which defendant had in the presence of one *John Sanders*, falsely, wickedly, and maliciously, spoke and published of and concerning plaintiff, the false, scandalous, malicious and defamatory words following; that is to say, "*Dancaster* (meaning plaintiff) is a damned rogue and a rascal; I (meaning defendant) have heard he (meaning plaintiff) intends to set up in business against me (meaning defendant); and I (meaning defendant) will do my (meaning defendant's) best to transport him (meaning plaintiff), as he (meaning plaintiff) has been working for me (meaning defendant) some time, and has been robbing me (meaning defendant) all the time, though to what extent I (meaning defendant) do not know; he (meaning plaintiff) has also taken steel from me (meaning defendant) to make tools with, and has made tools for his (meaning plaintiff's) own use, when he (meaning plaintiff) ought to have been employing himself (meaning plaintiff) for me (meaning defendant)." The declaration also contained a count, charging the defendant with having maliciously, and without any probable cause, preferred a charge of felony against the plaintiff before a justice of the peace, who thereupon issued his warrant, under which the plaintiff was taken into custody. Plea, first, the general issue; secondly, to the count in slander, that defendant did, on, &c., at, &c., feloniously steal, &c., certain goods and chattels of defendant, to wit, &c.; wherefore defendant afterwards, at the said several times, &c., did speak and publish, &c., as he lawfully might for the cause aforesaid. Replication, *de injuriâ suâ propriâ absque tali causâ*. At the trial before *Littledale*, J., at the last spring assizes for

the city and county of the city of Exeter (*a*), *Sanders*, the officer by whom the plaintiff was taken into custody, proved, that while he was proceeding with the defendant to search the plaintiff's house under the warrant, the defendant, who seemed very warm, said, "that *Dancaster* had worked for him, and had been continually robbing him; that he was now about to set up in business against him; that he had some property at Southampton; and that he would transport him," or "that he deserved to be transported." It was objected, that the words proved are introduced into the declaration only as a reason for the intention expressed, and not by way of direct assertion. The learned Judge refused to nonsuit the plaintiff, but gave the defendant leave to move, if in the result it should become necessary. The jury found a verdict for the defendant upon the last count, and for the plaintiff upon the first count, both upon the general issue and the justification, with forty shillings damages.

E. Lawes, Serjt., now moved to enter a nonsuit, according to the liberty reserved. The words laid in the declaration were not proved, and they were spoken on a privileged occasion. The latter point is a most important one. The words spoken evidently had reference to the charge which had been made (*b*). [*Bayley*, J. The words do not point to a description of the goods for which the warrant directed the officer to search.] Secondly, The words laid were not proved. Though words used by way of alleging a reason are sufficient to maintain an action, yet they must be so stated in the declaration. In *Walters* v. *Mace* (*c*), the words charged were, "*this* is my umbrella, he stole it from my back door:" the words proved were, "*it* is my umbrella, and he stole it from my back door:" and the Court discharged

(*a*) Counsel for the plaintiff, *Wilde*, Serjt., and *Manning*; for the defendant, *Merewether* and *E. Lawes*, Serjts.

(*b*) As to the point of privilege, vide *Dunman* v. *Bigg*, 1 Campb. 269, n.

(*c*) 2 B. & A. 756. And see 1 Chit. Rep. 507. *S. C.*

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a rule for setting aside the nonsuit, on the ground that the words laid purported to be spoken of something present; whereas the word "it," which is ambiguous, and may be spoken of a thing present or absent, appeared by the evidence to have been used respecting an umbrella which was in the plaintiff's house, while the conversation took place at the defendant's.

Lord TENTERDEN, C. J.—I am of opinion that in this case there ought to be no rule. The words stated in the declaration amount to a positive allegation that the plaintiff had robbed the defendant. The other question was, whether the words were spoken on an occasion in which the defendant was privileged in using them; and I think that, under the circumstances, the defendant was not at liberty to accuse the party of robbing him.

The other Judges concurred.

Rule refused.

METCALFE *v.* CLOUGH.

A direction to an agent to pay over the proceeds of a sale, is not revocable, if founded upon a valuable consideration.

ASSUMPSIT for money had and received. At the trial at the last assizes for the county of York, before *Bayley*, J., it appeared that the estate of *T. C.*, which was in mortgage to the plaintiff, being advertised for sale by the plaintiff, the following letter was written by *T. C.* to the defendant:—"I the undersigned *T. C.* authorize and empower ——— *Clough* to enter upon my lands, and to seize my coombs and farming stock, and sell and dispose of the same, without being deemed a trespasser, which entry and sale I declare to be for the benefit of myself and ——— *Metcalfe* (the plaintiff)." In consequence of this arrangement the sale was put off. Some time afterwards *T. C.* wrote to defendant a letter, in which he said, "having seen an advertisement of the sale of my property I give

you notice not to pay over to *Metcalfe*, but to keep the money in your hands for my use." Upon this evidence the plaintiff obtained a verdict.

Cross, Serjt., now moved for a new trial. The question is, whether the plaintiff can compel the defendant, after this notice, to pay him the proceeds of the sale. There was no mutuality between the plaintiff and the defendant. The defendant had merely a naked authority from *T. C.* He was to act as agent for *T. C.* This is a very hard case upon the defendant, who was placed in a very difficult situation between the plaintiff and *T. C.* If *A.* lends *B.* money, and desires *B.* to pay the amount to *C.*, and afterwards directs *B.* not to pay the money to *C.*, *C.* could not sue *B.*, that is, even supposing an authority to have been originally given to pay over the money, which is not the case here. [*Bayley*, J. Was *T. C.* present when the authority was given?] Yes, he was.

Lord TENTERDEN, C. J.—Upon the true construction of this document, it is an authority to the defendant to pay over the money to the plaintiff, and not merely the expression of an intention so to apply it. The words are, "are to be applied," which import an absolute authority. Such an authority might be revocable; not, however, if it was founded upon a sufficient consideration. The plaintiff held a mortgage upon *T. C.*'s land, the sale of which was postponed in consequence of this arrangement. If it had appeared that the plaintiff had agreed to postpone the sale, and in violation of that agreement had brought the property to sale before the expiration of the time for which the indulgence was given, the case would have been very different. No such violation of the agreement appeared. The postponement may have been for a fortnight, or till some purchaser had been treated with.

The other Judges concurred.

Rule refused.

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DOE on the Demise of MORGAN *v.* AMOS.

Where the subject-matter of an agreement is a limited interest worth *less* than 20*l.*, in a thing worth *more* than 20*l.*, the agreement does not require a stamp.

EJECTMENT. At the trial before *Vaughan*, B., at the last assizes for the county of Salop (*a*), a question arose whether an agreement produced on the part of the plaintiff was or was not admissible in evidence without an agreement stamp, that question arising out of another, namely, whether the subject-matter of the agreement was or was not of the value of 20*l.* The agreement related to certain premises, in respect of which it created a tenancy between the plaintiff and the defendant, determinable by a six months' notice on either side. The rent reserved was 2*s.* 6*d.* a year. The actual value by the year was 5*l.* The gross value was 200*l.* The learned Judge was of opinion that the agreement required no stamp. The plaintiff had a verdict, with liberty to the defendant to move to enter a nonsuit.

Campbell moved accordingly. The agreement required a stamp. The subject-matter of it must be considered to be the premises themselves, which were worth 200*l.* It is not, therefore, within the exemption of the 55 *Geo.* 3, c. 184, sched. part 1, title *agreement*, as an agreement the subject-matter of which is beneath the value of 20*l.*

Lord TENTERDEN, C. J.—The question is, whether the subject-matter of the agreement is the house itself, or the right of occupation of it under the agreement. The rent paid was 2*s.* 6*d.* a year; the real value was 5*l.* a year: therefore the right of occupation could not be worth 20*l.*, because the occupation was determinable at any time upon giving six months' notice. The value of the house itself was much more than 20*l.* I am of opinion that the right of occupation was the subject-matter of the agreement, and that consequently no stamp was requisite. A stamp is

(*a*) Counsel for the plaintiff, *Taunton* and *Whateley*; for the defendant, *Campbell*.

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required only where the value of the subject-matter exceeds 20*l.*; therefore it was for the defendant, who relied upon the objection, to make out the affirmative of that proposition. I think the statute does not apply to this case; but the language of it is very ambiguous, and upon that ground we ought to hold this agreement exempt, because we ought to be able to say clearly and affirmatively that a stamp is required, before we hold it necessary. I therefore think we ought to grant no rule.

The other Judges concurred.

Rule refused. (*a*)

(*a*) And see *Orford* v. *Cole*, 2 Stark. N. P. C. 353.

PENNY and another, Assignees of BUNCOMBE, a Bankrupt, *v.* FOY.

DEBT by the plaintiffs as assignees of one *Robert Buncombe*, a bankrupt, on a bond made to him by the defendant, dated 7th June, 1817, and conditioned for payment of 329*l.* and interest on 7th June, 1822. Plea, among others, a set-off in respect of a bond made by the bankrupt to the defendant, dated also 7th June, 1817, in the penal sum of 300*l.* The condition of the latter bond was set out in the plea as follows:—After reciting that certain lands and messuages of the said *Robert Foy* (the defendant) were then charged with the payment of an annuity of 50*l.* to *Elizabeth Buncombe*, widow, and which annuity the said *Robert Foy* had also engaged to pay to the said *Elizabeth Buncombe;* and reciting that the said *Robert Buncombe* (the bankrupt), in consideration of 140*l.* to him paid by the said *Robert Foy*, had agreed with the said *Robert Foy* to pay and discharge the said annuity to the said *Elizabeth Buncombe* during her life, and to *indemnify* the said *Robert Foy* from the same; the con-

A. being principal and *B.* surety in an annuity bond to *C.*, *A.* gave *B.* a bond conditioned to pay the annuity to *C.*, and to indemnify *B.* from any claims of *C.*:—Held, that this was not a mere indemnity bond, and that *B.* therefore might put it in suit as soon as *A.* made default in payment of the annuity, without proving that he had been actually damnified.

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dition of that bond was declared to be such, that if the said *Robert Buncombe*, his heirs, &c., did and should from time to time pay to the said *Elizabeth Buncombe*, her executors, &c., the said annuity, during her life, and should at all times save harmless and keep indemnified the said *Robert Foy*, his heirs, &c., and his and their lands, &c., of and from all actions, &c., concerning the same annuity; then the said bond was to be void, but otherwise to remain in full force and virtue. The plea then went on to state that *Robert Buncombe* did not pay the annuity to *Elizabeth Buncombe*, but wholly neglected so to do; and that after the making of the said bond, and during the life-time of *Elizabeth Buncombe*, the sum of 200*l.*, on account of the said annuity for four years, became and was due and owing and in arrear to *Elizabeth Buncombe*, contrary to the form and effect of the said condition; and that before and at the time of the exhibiting of the plaintiffs' bill, the bankrupt was indebted to the defendant in the sum of 200*l.*, being the amount of the arrears of the said annuity; which the defendant, in the usual form, claimed to set off. Replication, denying that the bankrupt was so indebted to the defendant. Issue thereon. At the trial before *Gaselee*, J., at the last Somersetshire assizes (*a*), the plaintiffs obtained a verdict upon other issues; but the issue above set forth was found for the defendant, the learned Judge being of opinion that in the absence of evidence of payment of the annuity, the defendant was entitled to set off the amount of the arrears which would have become due by mere lapse of time. He, however, gave the plaintiff leave to move to enter a verdict upon this issue also.

Wilde, Serjt., moved for a rule to shew cause why that verdict should not be entered for the plaintiffs on the above issue. This was a mere indemnity bond; and as it was neither stated in the plea nor proved at the trial, that the

(*a*) Counsel for the plaintiffs, *Wilde*, Serjt., and *Jeremy*; for the defendant, *Erskine* and *Follett*.

defendant had sustained any actual damage by reason of default made in the payment of the annuity, he was not entitled to put the bond in suit, or plead it by way of set-off. It by no means followed, because the annuity was 200*l.* in arrear to *Elizabeth Buncombe*, that therefore the defendant had paid that sum, and so been damnified to that extent; and if the fact was so, it lay upon the defendant to aver it in his plea, and to prove it in support of his set-off.

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BAYLEY, J.—I cannot agree that this is, as has been assumed, a mere indemnity bond. If it were, undoubtedly the surety must prove himself damnified, before he could put it in suit; but I think it is not so.

Lord TENTERDEN, C. J.—The case of *Toussaint* v. *Martinnant* (*a*) is an authority to shew that where there is a mere indemnity bond, the surety must shew that he is damnified; and that when he has done so, the bond becomes forfeited. But here part of the condition of the bond was, that the bankrupt should pay the annuity; and the indemnity was only another part of the condition. Default was made in payment of the annuity, and the bond thereby became forfeited. The defendant was entitled either to have the annuity paid by the bankrupt, or to have the money deposited in his own hands to enable him to pay it: he was not bound to pay it first out of his own pocket, and then apply to the bankrupt to reimburse him. As it is, he is liable for the arrears of the annuity; and he has no security or remedy except the bond, which I think he had a right to put in suit as soon as default was made in payment of the annuity.

The other Judges concurred.

Rule refused.

(*a*) 2 T. R. 100.

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DYEBALL v. DOE, on the Demise of LAWRIE and another, in Error.

Judgment may be entered up generally for the plaintiff in an ejectment brought for a messuage *and tenement*.

THIS was a writ of error brought to reverse a judgment in ejectment, which had been entered up *generally* for the plaintiff below, the ejectment having been brought for a messuage *and tenement*.

Chitty for the plaintiff in error. Ejectment does not lie for a tenement, *eo nomine*. In *Worral* v. *Bent* (*a*), and in *Doe* v. *Plowman* (*b*), judgment was arrested for this defect. And in *Goodtitle* v. *Otway* (*c*), a rule having been obtained to arrest the judgment upon the same ground, the Court got over the difficulty by giving the plaintiff leave to enter up the verdict for the messuage only. The damages cannot now be severed, and the Court is bound to pronounce judgment upon the whole record.

Brodrick, contrà, was stopped by the Court.

Lord TENTERDEN, C. J.—If ejectment lies for a tenement of any kind, this may be deemed to have been such a tenement. If not, the damages may all be applied to the messuage. It is an established rule, that where one count contains two claims or complaints, for one of which the action is maintainable and not for the other, all the damages may be applied to the good cause of action. Where they are stated in separate counts it is different (*d*).

BAYLEY, J.—The jury may be considered as having given all the damages in respect of the messuage, and then the objection falls to the ground.

The other Judges concurred.

Judgment affirmed.

(*a*) 2 Stra. 835.
(*b*) 1 East, 441.
(*c*) 8 East, 357.
(*d*) Vide *Osborne*'s case, 10 Co. 130; *Onslow* v. *Horne*, 3 Wils. 177; *Clement* v. *Fisher*, *ante*, vol. i. 231; 2 Wms. Saund. 307 b.

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WILDBORE *v.* RAINSFORTH and another.

If a pauper who has occupied a parish house by sufferance leaves it for a time, the parish officers may lawfully enter and take possession, without giving any notice to quit, and without pursuing the provisions of 59 *Geo.* 3, c. 12, s. 24.

TRESPASS. First count, for breaking and entering plaintiff's house, making a noise and disturbance therein, and seizing and carrying away her goods. Second, for ejecting plaintiff from her house. And third, for seizing and carrying away her goods. Pleas, the general issue, not guilty, with several special pleas. The latter stated, in substance, that the goods in the declaration mentioned were the property of certain persons, naming them, and had been delivered to the plaintiff to be taken care of and re-delivered on request. Some of them concluded by alleging that the plaintiff took such bad care of the goods, that they were in danger of being lost or stolen, wherefore the defendants, by command of the owners, entered the house, the door being open, and re-took them; and others, that the plaintiff refused to re-deliver the goods on request, wherefore the defendants re-took them. Replications to some of the pleas *de injuriâ suâ*, and to others, traversing the property in the goods as pleaded. At the trial before *Alexander*, C. B., at the last Lincolnshire assizes (*a*), the case was this:—The plaintiff was the widow of a pauper, who died in the month of October, 1826, having for some time prior to his death received parish relief and been permitted by the parish officers to occupy the house in question, which they had for a considerable period rented of one *Dennis*. The plaintiff, after the death of her husband, was suffered to continue in the occupation of the house, together with several children, the issue of a former marriage, in respect of whom she received parish relief, down to the beginning of July, 1826, when she left the house and the children in it, in the care of a lodger, to whom she had let out a room. Two days afterwards the defendants, who were the overseers of the parish, entered and took possession of the house, and carried the

(*a*) Counsel for the plaintiff, *Denman* and *Clinton*; for the defendant, *Clarke* and *Reader*.

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children to the workhouse. In a few days afterwards the plaintiff returned, and re-took possession of the house; and shortly after that the defendants came to the house, and having demanded and been refused admission, forced the door, and carried away the furniture, which had been put in by and belonged to the parish. The learned Judge told the jury, that if they considered the house and furniture to be the property of the parish, the defendants, as overseers of the parish, were justified in doing as they had done, and were entitled to a verdict. The jury found a verdict for the defendants.

Denman, C. S., moved for a new trial. Assuming the house and furniture in question to have belonged to the defendants as the officers of the parish, still they were not justified in taking possession of them in the manner they did, but should have pursued the course prescribed by the statute 59 *Geo.* 3, c. 12, s. 24. That clause recites, "that difficulties have frequently arisen, and considerable expenses have sometimes been incurred by reason of the refusal of persons who have been permitted to occupy, or who have intruded themselves into parish or town houses, or other tenements or dwellings, built or provided for the habitation of the poor, or otherwise belonging to such parishes, to deliver up the possession of such houses, tenements, or dwellings, when thereto required;" and then enacts, "that if any person who shall have been permitted to occupy any parish or town house, or any other tenement or dwelling belonging to, or provided by or at the charge of any parish for the habitation of the poor thereof, or who shall have unlawfully intruded himself or herself into any such house, &c., shall refuse or neglect to quit the same, and deliver up the possession thereof to the churchwardens and overseers of the poor of any such parish, within one month after notice and demand in writing for that purpose, signed by such churchwardens, &c., shall have been delivered to the person in possession, or, in his or her absence, affixed on

some notorious part of the premises, it shall be lawful for any two of his majesty's justices of the peace, upon complaint to them made by one or more of the churchwardens, &c., to issue their summons to the person against whom such complaint shall be made, &c.; and such justices are hereby empowered and required, upon the appearance of the defendant, or upon proof on oath that such summons has been delivered, &c., as hereby directed, to proceed to hear and determine the matter of such complaint; and if they shall find and adjudge the same to be true, then by warrant under their hands and seals to cause possession of the premises in question to be delivered to the churchwardens, &c., of the parish, or to some of them." None of these provisions were complied with in the present case. [*Bayley*, J. The plaintiff paid no rent. The house was the property of the defendants. There was no tenancy. The plaintiff merely occupied by sufferance, and the defendants might determine her occupancy when they chose.] By lawful means undoubtedly they might; but they have not adopted lawful means. The plaintiff was entitled to a month's notice to quit, and to keep possession until the expiration of that notice. The statute was intended to protect the poor, by qualifying the power of the parish officers. The defendants could not legally have acted in the manner they did before the statute passed, and it certainly was not intended to enlarge their powers. It would be highly dangerous to put such a construction upon it. [Lord *Tenterden*, C. J. The statute was intended also for the relief and convenience of the parish officers. *Bayley*, J. And they act in such cases at their peril. They must take care not to commit a breach of the peace.] The expulsion of the plaintiff, as complained of in the declaration, is not justified by the pleas; and at any rate the jury should have been left to dispose of that part of the case. [*Bayley*, J. There does not appear to have been any evidence in support of that part of the complaint.]

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Lord TENTERDEN, C. J.—I think we ought not to grant any rule in this case. The plaintiff was not the tenant of the house; she was merely permitted to occupy it by the parish officers. Her occupation was theirs. The act of parliament was not intended to take away the common law right of owners of premises to enter and take possession, if it could be done peaceably, but to provide an easy and expeditious mode for the recovery by parish officers of the possession of premises wrongfully withheld, and to prevent, what had occasionally occurred, their taking possession *vi et armis*, which led to breaches of the peace, and to further expense and litigation. Here the plaintiff had left the house, and might be deemed to have abandoned the possession. The defendants entered the house, and re-took possession, and subsequently removed the furniture, which was parish property. They have really done no more than they might lawfully do either before or since the passing of the act of parliament; there is, therefore, in my opinion, no ground for disturbing the verdict.

BAYLEY, J.—The act of parliament applies expressly to cases where parties have wrongfully intruded themselves into premises, and to cases where they have been permitted by the parish officers to occupy them. Now in the former description of cases it is impossible to suppose that the legislature intended to prevent the parish officers from re-taking possession, where they could do so without committing a breach of the peace. It seems to me, therefore, that the statute does not apply to the present case at all, and that the defendants, having the soil and freehold of the house as the parish officers, were justified in entering and taking possession of it, when it had been abandoned, as it was, by the plaintiff.

The other Judges concurred.

Rule refused (*a*).

(*a*) And see *Butcher* v. *Butcher*, *ante*, vol. i. 228 (*c*); *Johnson* v. *Howson*, *post*.

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BOLLAND and others, Assignees of MARSH and others, Bankrupts, and of FAUNTLEROY, a Bankrupt, *v.* NASH.

ASSUMPSIT on two bills of exchange; one for 3000*l.*, dated 17th July, 1824, at three months, drawn by *Fauntleroy* upon defendant, accepted by him, and indorsed by *Fauntleroy* to the bankrupts: the other for 1000*l.*, at the same date, and drawn, accepted and indorsed in the same manner. Plea, *non assumpsit*, and issue thereon. At the trial before Lord *Tenterden*, C. J., at the adjourned Middlesex Sittings after Trinity Term, 1827, (*a*) the plaintiffs obtained a verdict, damages 2,760*l.* 11*s.*, subject to the opinion of the Court upon the following case:—

The bills for 3000*l.* and 1000*l.* were drawn and accepted as stated in the declaration. The bankrupts, *Marsh* and Co., who were the defendant's bankers, discounted the bills for the defendant on the 17th July, 1824, and the drawer indorsed the bills in blank, and delivered them to the bankrupts, and afterwards, and before *Marsh* and Co. became bankrupts, and before the bills became due, Messrs. *Martin* and Co. discounted the bills for the bankrupts, who indorsed the bills in blank, and delivered them to *Martin* and Co. *Marsh* and Co. having become bankrupts on the 16th of September, 1824, commissions of bankrupt were duly issued against them, and the plaintiffs were duly appointed assignees. At the time of the bankruptcy, the defendant had two accounts with the bankrupts, one in his own name, the other in the names of *Nash* and *Lyon*. On the former of these he had overdrawn to the amount of 1,478*l.* 11*s.* 6*d.*, independently of the outstanding bills, on which the action was brought. On the latter account there was a balance in his favour to the amount of 8,830*l.* It was admitted at the trial, that for the purpose of mutual credit, or set-off, both accounts were to be considered as the accounts of the bankrupts with the defendant solely. But at the time of

(*a*) Counsel for the plaintiffs, Sir *James Scarlett* and *Chitty*; for the defendant, *F. Pollock* and *Bolland*.

A. accepted bills drawn by *B.*, his banker, who discounted the bills, and indorsed them for value to *C.* *B.* became bankrupt before the bills were due, having in the hands of *C.* money more than sufficient to cover the bills, and having in his own hands money of *A.*; *C.* presented the bills, when due, to *A.* for payment, which was refused, whereupon he paid himself out of the money of *B.* in his hands and gave up the bills to *B.*'s assignees. In an action by *B.*'s assignees against *A.* upon the bills:—Held, that there was a mutual credit between *A.* and *B.* before the bankruptcy of the latter, and that *A.* might set off against the claim of *B.*'s assignees in respect of the bills, the sum due to him from *B.* at the time of his bankruptcy.

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the bankruptcy, the bankrupts also held other bills accepted by the defendant, to the amount of 5000*l.* At the time of the bankruptcy, *Martin* and Co. still held the bills declared upon, and they then had in their hands money of *Marsh* and Co. to the full amount of the bills, which did not become due till afterwards, viz. on the 20th October. When they fell due, *Martin* and Co. duly presented the bills for payment, but the defendant refused to pay them; whereupon *Martin* and Co. immediately paid themselves the amount of the bills, without interest, out of the money of *Marsh* and Co. in their hands; and the defendant being then requested by the assignees to pay to them the amount of the bills, insisted upon deducting the sum of 2,351*l.* 8*s.* 6*d.* as the amount due to him on the balance of the two accounts, and paid them, on the 2d April, 1825, 1,648*l.* 11*s.* 6*d.* being the difference between the said sum of 2,351*l.* 8*s.* 6*d.* and the amount of the bills, 4000*l.* The question for the opinion of the Court is, whether the defendant could set off the 2,351*l.* 8*s.* 6*d.* against the amount of the bills (*a*).

Chitty, for the plaintiffs. The question in this case is, whether there was a mutual credit between the defendant and the bankrupts, before they became bankrupts, so as to entitle him to deduct from the sum claimed by the plaintiffs the sum owing to him from the bankrupts, at the date of the act of bankruptcy. The facts of the case all occurred previously to the passing of the new Bankrupt Act, 6 *Geo.* 4, c. 16, and the question therefore turns upon the former act, 5 *Geo.* 2, c. 30, s. 28. That clause enacts, that where it shall appear that there has been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, one debt may be set against the other; and what shall appear to be due on either side on

(*a*) There was another question reserved by the case, namely, whether any and what interest could be recovered in the action; but that point was not argued, it having been agreed that it should be settled out of Court.

the balance of the account, and on setting such debts against one another, and no more, shall be claimed or paid on either side. There was no mutual credit in respect of these bills, when they became due. The defendant gave credit to the bankrupts, by entrusting them with his money; but the bankrupts gave no credit to the defendant at the date of the act of bankruptcy. In *Dickson* v. *Evans* (*a*), Lord *Kenyon* said, that in cases of this sort, the question must be considered in the same manner as if it had arisen at the time of the bankruptcy, and cannot be varied by any change of situation of one of the parties. Here, the bankrupts had no claim upon the defendant in respect of the bills at the time of the bankruptcy, for the bills were at that time held by *Martin* and Co., and the credit, therefore, at that time was given by the bankrupts, not to the defendant, but to *Martin* and Co. In *ex parte Hale* (*b*), *Hale* was the holder of a bill for 200*l.* accepted by the bankrupt, which he indorsed away. The bankrupt, at the time of his bankruptcy, held a bill accepted by *Hale* for 90*l.* After the bankruptcy, *Hale* took up the bill accepted by the bankrupt, and which he had indorsed, and claimed to set off the 90*l.* and prove for the residue. It was held, that he might prove for the 200*l.*, but that he could not set off the amount of his own acceptance. In *ex parte Burton* (*c*), *Burton* was drawer, and *Franco* and *Corea* acceptors, of a bill, which *Burton* had got discounted by *Kensington* and Co., his bankers. *Kensington* and Co. became bankrupts before the bill was due, having at the time in their hands a balance owing to *Burton* larger than the amount of the bill. The bill having passed into the hands of *Kensington* and Co.'s assignees, it was held that there was no mutual credit between *Kensington* and Co. and *Burton*, and therefore that *Burton* was not entitled to set off against the bill the balance owing to him from *Kensington* and Co. The defendant here has nothing to complain of; he has had the value of the bills as regards himself and the other creditors: the proceeds were carried

(*a*) 6 T. R. 57. (*b*) 3 Ves. jun. 304. (*c*) 1 Rose's B. C. 320.

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to his credit, and he might have drawn them out at any moment before the bankruptcy.

F. Pollock, contrà. This is a clear case of mutual credit. The defendant gave credit to the bankrupts by depositing his money in their hands; and the bankrupts gave credit to the defendant by discounting his bills for 4000*l.* From the moment the bankrupts discounted the bills, they made the defendant their debtor, and themselves his creditors; for although it was *debitum in præsenti solvendum in futuro*, the relation of debtor and creditor did not the less exist. The bankrupts trusted the defendant to the amount of the bills, and did not cease to trust him when they paid the bills away, because they still believed that he would take up the bills when they became due. But even if the credit ceased when the bankrupts paid away the bills, still it ceased for a time only; it was only suspended, not destroyed: and when the bills came into the possession of the plaintiffs, as the bankrupts' assignees, the credit revived, and they were restored to all the original rights of the bankrupts themselves. *Ex parte Hale* does not apply, for there it was clear that no credit was given. *Ex parte Boyle* (*a*) is in point for the defendant. It was there held, that if a bankrupt is indebted to a creditor in two sums, for one of which the creditor may prove, and for the other not; and the creditor is indebted to the bankrupt in a sum for business done; the creditor may set off that sum against the debt which he cannot prove, and may prove for the other debt. (He was here stopped by the Court.)

Lord TENTERDEN, C. J.—I think the defendant is entitled to set off against the sum due to the plaintiffs on the bills, the sum due to himself on the balance of his accounts with the bankrupts, on the ground that there was a mutual credit subsisting between the defendant and the bankrupts before the bankruptcy, within the meaning of *5 Geo. 2*,

(*a*) Cooke's B. L. 571.

c. 30, s. 28. That section provides, "that where it shall appear to the commissioners, that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, *at any time before such person became bankrupt*, the commissioners, or the assignees, shall state the account between them, and one debt may be set against another; and what shall appear to be due on either side, on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively." The question, therefore, in this case is, whether there was a mutual credit between the defendant and *Marsh* and Co., before *Marsh* and Co. became bankrupts. The bills were drawn by one of the partners in the house of *Marsh* and Co. They were drawn for the convenience of the defendant. They were accepted by him. He discounted them with *Marsh* and Co., and they gave him credit as the acceptor of the bills. They had money of his in their hands, which he suffered to remain there; therefore he gave them credit as his bankers. So that, originally, there was clearly a mutual credit constituted between them. Then was it competent to *Marsh* and Co., by any act of their own, independently of the defendant, to destroy that mutual credit, and to deprive the defendant of his right to set off the debt due from them to him against the debt due from him to them, or their assignees, in respect of the bills? It is admitted, that if *Marsh* and Co. had never parted with the bills, there would have been a continuing mutual credit between them and the defendant, and that he would have had the right of set-off, which he now claims; and I am of opinion that they could not, by their own act in paying away the bills, destroy that mutual credit, and deprive him of that right. The present case is distinguishable from the two cited on the part of the plaintiffs. In *ex parte Hale*, it does not appear that *Hale* was the drawer of the bill, and if not, there was no mutual credit originally constituted between him and the bankrupt. In *ex parte Burton*, *Bur-*

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ton was the drawer of the bill, and *Franco* and *Corea* were the acceptors. *Burton* was one of the petitioners, and, as between him and the acceptors, was the person who ought to have paid the bill. In this case the defendant was the person who ought to have paid the bills. For these reasons I am of opinion that the defendant is entitled to the benefit of his set-off, and, consequently, that the judgment of the Court ought to be for the defendant.

BAYLEY, J.—It seems to me that this is a very clear case of mutual credit. Was not *Nash* a debtor of *Marsh* and Co. before they became bankrupts, or, had they not before that time given him credit? Most clearly. He wanted money upon the bills. They advanced him money upon them. The relation of debtor and creditor was then constituted between them. *Marsh* and Co. might have maintained an action for money had and received to their use. Then *Nash* gave credit to *Marsh* and Co. for money of his in their hands. That constituted a mutual credit between them, by means of an immediate transaction between them, and without the introvention of a third person. In *ex parte Hale*, there was no immediate transaction between the bankrupt and the indorser of the bill; there was no credit given by the acceptor to the indorser: there was never, as between those parties, *debitum in præsenti solvendum in futuro*. In *ex parte Burton*, the decision arrived at was the only one that could be arrived at, consistently with the principle of set-off. The debtors on the bill there were *Franco* and *Corea*, the acceptors of the bill. *Burton* was the drawer of the bill, having money in the hands of *Kensington* and Co. at the time when they became bankrupts; and the whole transaction of the petition was a contrivance to transfer *Burton's* right against *Kensington* and Co. to *Franco* and *Corea*, and to pay *Burton* in full at the expense of the other creditors.

HOLROYD, J. concurred.

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LITTLEDALE, J.—There was certainly a mutual credit originally created between the bankrupts and the defendant. The bankrupts paid the bills away, but they were afterwards returned to them. If they had never paid the bills away, there would have been a continuing mutual credit; and though I think the mutual credit was suspended while the bills were out of the possession of the bankrupts, I have no doubt that it revived when they returned into their hands, or into those of their assignees.

Judgment for the defendant.

DOE on the Demise of OLDNALL and Wife *v.* DEAKIN and another.

EJECTMENT. At the trial before *Vaughan*, B., at the last Worcester assizes (*a*), it appeared that *Thomas Wolley* died seised, in 1800, and by his will, dated February 21, 1798, (thirty years and twenty days before the trial,) devised the lands in question to his wife for life, suffering the reversion to descend to his heir. The lessors of the plaintiff claimed under Miss *Frances Wolley*, heir of *T. W.* To prove the descent from *T. W.* to *F. W.*, the marriage settlement of *Thomas Wolley*, the grandfather of *T. W.*, the testator, was produced, from which it appeared that *T. W.*, the settlor, and *Edward*, the grandfather of Miss *F. W.*, were the sons of *Thomas Wolley*, who had three other sons, *George*, *Richard*, and *John*, who were all older than *Edward*. The will of *T. W.*, the person last seised, was also produced (*b*) from the ecclesiastical court, but

A will more than thirty years old proves itself, though the testator died within thirty years.

In a pedigree, persons presumed to be dead are presumed to have died unmarried and without issue.

(*a*) Counsel for the plaintiff, *Taunton*, *Russell*, Serj. and *Curwood*; for the defendant, *Campbell*, *R. V. Richards*, and *Whateley*.

(*b*) *T. W.*, under whose seisin the plaintiff claimed, having been dead more than twenty years, his will appears to have been produced for the purpose of shewing that the subsequent occupation by the widow was not adverse. It would seem, however, that it lay on the defendant to shew that her occupation was inconsistent with the title of the lessor of the plaintiff. *Reading* v. *Rawsterne*, 2 Ld. Raym. 880.

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one of the attesting witnesses being shewn to be still alive, it was objected that such witness ought to have been called, the will being a nullity until the death of the testator in 1800. The learned judge, however, was of opinion that the thirty years must be computed from the date of the will; and he told the jury that they might presume that the three elder brothers had died without issue. A verdict was found for the plaintiff.

Campbell now moved for a new trial, on the ground that the will was not sufficiently proved, and for misdirection. In *M'Kenire* v. *Fraser* (*a*), the question was raised whether a will more than thirty years old proved itself. The will was there admitted to be read, upon proof of the death of two of the witnesses, and of an ineffectual inquiry concerning the third, which seems to have been considered to be necessary. In that case also, the testator had been dead more than thirty years. There is a great difference between a deed and a will; a deed requires no witnesses, besides which, a will is ambulatory until the death of the testator. Here no possession under the will was proved, Lord *Rancliffe* v. *Parkyns* (*b*). Mr. *Phillipps* says, the general rule seems to be, that a will thirty years old, unless there has been possession under it, must be proved like any other

(*a*) 9 Ves. 5. In that case the marginal note is, "Whether the rule that a deed thirty years old proves itself, applies to a will, *quære*." To which the American editor subjoins this note, "If possession accompany it, *Shaller* v. *Brand*, 6 Binn. 435; *Jackson* v. *Blanshaw*, 3 Johns. Rep. 289, (2nd edit.) and Reporter's notes. See *Jackson* v. *Larowny*, 3 Johns. Ca. 283; *Barr* v. *Gratz*, 4 Wheaton, 221." In *M'Kenire* v. *Fraser*, Sir W. Grant, M. R. says, "I do not see how a will can be distinguished from a deed; only that the former not having effect till the death, *wants a kind of authentication*, which the other has, that is, from the nature of the subject. But I think the proof sufficient in this case; for in a late case, (*Cunliffe* v. *Sefton*, 2 East, 183,) in the Court of King's Bench, an inquiry of just the same kind as you have made was held sufficient, which excludes the question. In that case they had made all inquiry, and could not hear any thing of the witness."

(*b*) 6 Dow, 202.

will (*a*). Secondly, there was no evidence that *Frances* was the heir of *T. W.*, the person last seised, the elder brothers of *Edward* not having been disposed of, *Doe* v. *Jesson* (*b*), *Richards* v. *Richards* (*c*).

Lord TENTERDEN, C. J.—The principle upon which the thirty years are reckoned from the date of a deed, applies to a will; and the fact of the witness being alive makes no difference. You are not to make the double presumption that the brothers married and left issue.

Rule refused.

(*a*) 1 Phill. 5th ed. 507; 7th ed. 503. *Et vide supra*, 196, note (*a*).
(*b*) 6 East, 80; 2 Smith, 236, S. C.
(*c*) Cited in *Doe* d. *Banning* v. *Griffin*, 15 East, 294. And see *Doe* d. *Lloyd* v. *Deakin*, 4 B. & A. 433.

BUSZARD and others, Assignees of the Estate and Effects of WILLIAM ROBINSON JONES and GEORGE JONES, Bankrupts, *v.* CAPEL and another.

TROVER for the conversion of two barges, two lighters, and two barges called crafts. The first count was upon a possession and loss by the bankrupts before their bankruptcy, and a conversion after the bankruptcy: the second count was upon the possession of the assignees. Plea, not guilty.

At the trial before Lord *Tenterden*, C. J., at the sittings after last Trinity term (*d*), a general verdict was returned for the defendants on the first count, and the following special verdict was found upon the second.

(*d*) Counsel for the plaintiffs, Sir *J. Scarlett*, *Campbell*, and *R. V. Richards*; for the defendants, *Marryat*, *Gurney*, and *Starr*.

Demise of a wharf, &c. with liberty to land and load goods, together with all ways, paths, passages, easements, profits, commodities and appurtenances to the said wharf, &c. belonging or appertaining. The landlord cannot distrain barges lying opposite the wharf between high and low water mark, and attached by ropes to the wharf, though it be found by verdict that the *exclusive use* of the land between high and low-water mark was demised as *appurtenant* to the wharf, as well when covered with water as dry.

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"That before and at the time of the making of the distress hereinafter mentioned, the within-named *W. R. Jones* and *G. Jones* had become, and then were bankrupts; and the said plaintiffs had been duly, according to the form of the statutes in such case made and provided, nominated, chosen and appointed assignees of the estates and effects of the said *W. R. Jones* and *G. Jones*, so being such bankrupts as aforesaid; that the within-named plaintiffs so being such assignees as aforesaid, before and at the time of the making of the distress hereinafter mentioned to have been made, were lawfully possessed, as of their property as such assignees as aforesaid, of the barges hereinafter mentioned to have been taken and distrained by the said defendants; that by indenture bearing date the ninth day of March, 1826, and made before the said *W. R. Jones* and *G. Jones*, or either of them, became bankrupt, between one *Thomas Brown* of the one part, and the said *W. R. Jones* and *G. Jones*, of the other part, the said *T. Brown* demised, leased, and to farm let unto the said *W. R. Jones* and *G. Jones*, all that wharf, ground, and premises next the river Thames, and also all that capital brick-built warehouse of three floors erected and built thereon, abutting, &c; together with free liberty for them the said *W. R. Jones* and *G. Jones*, their executors and administrators, during that demise, to land and load goods, wares, and merchandizes in common with the rest of the tenants of the said *T. Brown*, at &c; together with all cellars, sollars, rooms, chamber-ways, paths, passages, lights, easements, profits, commodities, advantages, and appurtenances whatsoever to the said wharf, ground, warehouses, and premises, or any of them belonging, or in anywise appertaining: to hold the same premises, with their and every of their appurtenances unto the said *W. R. Jones* and *G. Jones*, their executors, administrators, and assigns, from the 23d day of March then last past, for and during and unto the full end and term of 13 years, at the yearly rent of 565*l.* clear of the land-tax and all other taxes, by equal quarterly

payments, payable unto the said *T. Brown*, during such part of the said term as he may happen to live; and from and after his decease, unto the person or persons who for the time being should be entitled to the freehold of the premises: *that by the said indenture the exclusive use of the land of the river Thames opposite to and in front of the said wharf ground between high and low-water mark*, as well when covered with water as dry, for the accommodation of the tenants of the wharf *was demised as appurtenant to the said wharf, ground, and premises*, but that the said land itself between high and low water mark, *was not demised:* that before and on the 12th day of November, in the year of our Lord 1826, the sum of 565*l.* of the rent aforesaid was in arrear and unpaid, and on that day, and at the time of making the distress hereinafter mentioned, the two barges, the property of the said plaintiffs, as such assignees as aforesaid, were attached by ropes head and stern to the wharf ground aforesaid, and were lying and being on that part of the river Thames opposite to and in front of the said wharf ground and premises, and between high and low-water mark, the exclusive use of which was demised as aforesaid: that the said defendants, on the said 12th day of November, as the bailiffs of the person who was then entitled to the freehold of the said wharf and premises, and was duly authorized by law to distrain for the said arrears, seized and took the said two barges as and for a distress for the said arrears of rent, and shortly afterwards sold and disposed of the same to satisfy such arrears. But whether or not upon the whole matter, &c."

This special verdict was now argued by *R. V. Richards* for the plaintiffs, and *Starr* for the defendants.

Argument for the plaintiff. Lord Coke says (*a*), "a rent must be reserved out of the lands or tenements whereunto the lessor may have resort or recourse to distrain, as Littleton here also saith, and therefore a rent cannot be reserved by

(*a*) Co. Lit. 47, a.; 2 Tho. Co. Lit. 410.

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would lie for the exclusive use of water.—[*Bayley*, J. Would there be a right to enter?]—The right to use that which belongs to the lessor differs from the right to use that which has ceased to be his by reason of his having demised it. Lord Coke (*a*), in commenting on Westm. 2, cap. 25, with reference to the words "ita de cœtero in communiâ turbariæ, piscariæ, &c." says, "Bracton, who wrote before the making of this act, saith (*b*), Quod locum habet assisa de quâlibet communiâ pertinente ad liberum tenementum scil. communia pasturæ, turbariæ, &c. And in the reign of *Hen.* 3. which was before the making of this act, an assize did lie of a common of piscary; and these opinions had great probability of reason; yet because (as hath been said) there was no writ in the register in those cases, therefore, before this act no writ did lie by the general opinion of the judges, but now this act hath cleared the question." This distress being for a rent service, is not against common right, Co. Litt. 142, *a*. 142, *b*. (*c*) The Court will therefore afford every assistance to the exercise of this right. In Fleta it is said, "In quâlibet captione tria principaliter requiruntur, certus locus, certa causa et *seisina* alicujus." (*d*) The owner of an easement is always stated in pleading to be *seised* as of fee. Littleton says (*e*), "And if the lessor in such case reserved to himself an annual rent upon such lease, i. e. of lands or tenements, he may elect to distrain for the rent in the tenements leased, or he may have an action of debt for the arrearages against the lessee." Littleton does not confine the remedy by distress to land. And in Lord Coke's commentary upon this passage, which is the only authority against the defendants, the reason given why a distress cannot be taken in respect of an incorporeal hereditament is, that the lessor has no place to resort to for his distress. In *Bally* v. *Wells* (*f*), rent was reserved upon a demise of tithes, and the ques-

(*a*) 2 Inst. 412.
(*b*) p. 231.
(*c*) 1 Tho. Co. Litt. 443.
(*d*) Fleta, lib. ii. cap. 49.
(*e*) Sect. 58.
(*f*) 3 Wils. 25.

tion was, whether a covenant not to let any part of the tithes to the occupiers of the estates, ran with the estates, and bound the assignee. The Court held, that it did, and said, that tithes have every property of an inheritance in land, except that they lie in grant. Beasts on a common may be distrained for rent of the common. In the Year Book of 26 *Henry* 8, fol. 5, (*a*) in replevin against a prior, the defendant avowed for that the plaintiff and his ancestors, whose heir he is, and all those whose estate he hath, have used, from time whereof memory &c., to have common in one hundred acres of land of the defendant whereof the place in which &c., and further that the plaintiff and his ancestors, and all those whose estate &c., have used to pay at the feast of Christmas ten shillings rent to the defendant and his predecessors, and the defendant and his predecessors have used to distrain for that rent in the 100 acres the beasts of the said plaintiff, from time &c., if the rent were in arrear, and avers that the rent was in arrear on such a day, and therefore avows the taking. Mervin, (*b*) Sir, it seems to me that the prescription is not good, for he prescribes that the plaintiff hath used to pay, and that is not the form of a prescription: for the defendant should prescribe that he and his predecessors have used to have certain rent, and not that the plaintiff used to pay; and also because he prescribes to have distrained within his own land, so that he prescribes to have a distress within his own land, which would be inconvenient. Fitzherbert (*b*). As to the first question, it is a good prescription, for it may have a lawful beginning, and so the second, and it makes no difference whether he says that the plaintiff hath used to pay, or that the defendant hath used to have, for all is one; and as to the charging of his own land by distress, that is not so, for the plaintiff's beasts are chargeable, and not the land, for that is not charged but only the beasts.

(*a*) T. 26 *H.* 8, fo. 5, pl. 20.

(*b*) Edward Mervin, then serjeant. In 1539 he was made king's serjeant, and in 1541, justice, K. B.

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Mervin asks of him what rent it is. Fitzherbert(*a*)—This is an annuity and no rent, for he shall not have assise thereof, nor can he avow. *Quære ceo.* Mervin—Sir, he has alleged prescription of rent, but he has alleged no seisin thereof, wherefore his plea is not good. Fitzherbert—That is necessary, viz. to allege seisin, otherwise his plea is bad without doubt. Wherefore he gave day to *York* to amend his plea; *quod nota.* And afterwards, at another day, *Mervin* moved *Englefield* (*b*), and he said as *Fitzherbert* had said; *note the case.*" [*Bayley*, J. How can you distrain upon your own land?] In *Gray*'s case (*c*), where it was found upon a special verdict, that a copyholder was entitled to have common of pasture, paying *pro eâdem communiâ unam gallinam et quinque ova annuatim*, the doubt was, what remedy the terre-tenant had; and it was held that he might distrain the cattle of the commoner on his own land, for the hens and eggs, "and therewith agrees 26 *Hen.* 8, fo. 5." In *Gray*'s case, no prescription is mentioned as necessary to sustain the distress, but the right is assumed by the judge as incident to the tenure. The interest of the terre-tenant in that case is not comparable to that found by the special verdict here. The wharf was enjoyed in the only way in which it could be enjoyed. In the *Mayor of Northampton* v. *Ward* (*d*), the chief justice (*e*) thought that a distress might be taken for stallage (*f*). Lord *Coke* says, that if a man grant *herbagium terræ*, he (the grantee) hath a particular right in the land, and shall have an action *quare clausum fregit*, but the soil shall not pass. [*Holroyd*, J. Is there any word in the lease under which this would pass, except the word appurtenances?] The interest of the tenant resembles that which Lord *Coke* speaks of (*g*), where he says, "but if a man deviseth the vesture or herbage of his land, he may re-

(*a*) Chief Justice, C. P.
(*b*) Justice, C. P.
(*c*) 5 Co. Rep. 78, b.; Cro. Eliz. 405, *Gray* v. *Fletcher.*
(*d*) 1 Wils. 107, 115.
(*e*) Sir William Lee.
(*f*) As to stallage, see Com. Dig. *Market*, F. 2.
(*g*) Co. Litt. 47, a.; 2 Tho. Co. Litt. 410.

serve a rent, for that the thing is maynorable, and the lessor may distrain the cattle upon the land." In *Wilson* v. *Mackreth* (*a*), it is said that the exclusive right of digging turves is sufficient to support trespass *quare clausum fregit*. The words of Lord *Mansfield* are very strong. 11 *Geo.* 2, c. 19, s. 8, which authorizes the distraining of cattle upon commons appendant or appurtenant, is said to be a new enactment. That gives an authority to distrain any cattle; but there may have been a power of distress before. It is not precisely stated in any book, whether a distress may be taken for the rent of a common. The text books repeat the *dictum* of Lord *Coke*. In *Watson* v. *Maine* (*b*) it was held, that goods removed for the purpose of avoiding a distress, could not be followed by the landlord, unless the removal were clandestine. If the present distress cannot be supported, the tenant might remove his goods from the wharf to barges on the river. It was part of the demised premises. [*Bayley*, J. How would you frame an action of trespass against a party who entered on this part of the river?] It might be averred that he broke and entered a certain close whereof plaintiff had the exclusive possession. The position of the barges is found by the verdict. This case has been before the Court of Common Pleas(*c*), and a case was put by way of illustration by one of the learned judges of that court. Mr. Justice *Park* says, suppose a barrel of blacking in the act of being hoisted up to a warehouse in the Strand, could not the barrel be distrained for the rent of the warehouse? [Lord *Tenterden*, C. J. If the warehouse abut upon a highway, you are putting a point as disputable as that which is raised by the special verdict.] This case is much more favourable to the plaintiff. The soil between high and low-water mark is in the king. The commercial purpose to which this was applied is to be favoured.

(*a*) 3 Burr. 1824.
(*b*) 3 Esp. N. P. Cases, 15.
(*c*) 4 Bingh. 137.

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Richards, in reply.—Nothing passed but a liberty. There is no authority to shew that the property on an easement can be distrained for rent of the land to which the easement is attached. Trespass cannot be maintained for a mere *jus utendi*. With respect to the position of the barges, the verdict expressly negatives their being on the land demised. There is no reason for commercial purposes to extend the remedy by distress.

Cur. adv. vult.

Lord TENTERDEN, C. J.—It is difficult to say what is meant by that part of the special verdict which finds that the exclusive use of land was demised, but that the land itself was not demised. As land cannot be appurtenant to land, the land in question could not be demised as appurtenant to the wharf; and if the finding of the jury be understood to mean that the use and enjoyment of the land only was demised as appurtenant, such use and enjoyment would constitute merely a privilege or easement, out of which no rent could be issuing. In neither view of the case can this distress be supported.

Judgment for plaintiffs (*a*).

(*a*) Upon this judgment a writ of error was brought in the Exchequer Chamber.

DOE on the Demise of WATSON, Clerk, *v.* FLETCHER, Clerk.

Induction upon a simoniacal presentation is void against the presentee of the crown, who, upon being inducted, may maintain ejectment against the simoniac.

EJECTMENT for the rectory of Kettering, in the county of Northampton. At the trial before *Holroyd*, J., at the last assizes for the county of Northampton (*b*), the facts were these. The defendant was inducted into the rectory in 1814, upon the presentation of Lord Sondes, to whom he gave a bond conditioned to resign the rectory into the hands of the ordinary, upon such request as therein

(*b*) Counsel for the plaintiff, Sir *James Scarlett*, *Adams*, Serjt., and *Pennington*; for the defendant, *Clarke* and *Reader*.

mentioned, so as that the said rectory might thereby again become vacant, for the intent that Lord Sondes might be enabled to present thereto either the lessor of the plaintiff or *Richard Watson*, when such of them as should be so presented should be capable of taking an ecclesiastical benefice. This presentation having been held to be simoniacal, (*a*) the King presented the lessor of the plaintiff, who was also instituted and inducted. The lessor of the plaintiff went to the church for the purpose of reading himself in, and found the defendant in the reading desk. On the part of the defendant it was contended that his presentation was not simoniacal, that the lessor of the plaintiff had not read himself in, and that he had mistaken his remedy. The learned Judge over-ruled these objections, but gave the defendant leave to move, and a verdict was found for the plaintiff.

Clarke now moved for a nonsuit, upon the liberty reserved. It was said that this bond is contrary to the policy of the law—[Lord *Tenterden*, C. J. The House of Lords has decided that this bond is simoniacal and void (*a*); and an act of parliament (*b*) has passed for rendering such bonds valid if entered into before a certain time (*c*). By the 13 and 14 *Charles* 2, cap. 4, (*d*) every person, within two months after he shall be in the actual possession of any ecclesiastical benefice or promotion, shall, in the church, chapel, or place of public worship belonging to his said benefice or promotion, upon some Lord's day, openly, publicly, and solemnly read the morning and evening prayers appointed to be read by and according to the said Book of Common Prayer, at the time thereby appointed; and after such reading thereof, shall openly and publicly, before the congregation there assembled, declare his unfeigned assent and consent to the use of all things therein contained and prescribed, according

(*a*) 3 Bingh. 501.
(*b*) 7 & 8 *Geo.* 4, cap. 25.
(*c*) 9 April, 1827.
(*d*) Commonly called "The Bartholomew Act."

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to the form before appointed: and that all and every such person who shall (without some lawful impediment, to be allowed and approved by the ordinary of the place,) neglect or refuse to do the same within the time aforesaid, (or in case of such impediment, within one month after such impediment removed,) shall, *ipso facto*, be deprived of all his said ecclesiastical benefices and promotions: and that from thenceforth it shall and may be lawful to and for all patrons and donors of all and singular the said ecclesiastical benefices and promotions, or any of them, according to their respective rights and titles, to present or collate to the same, as though the person or persons so offending or neglecting were dead.—[Lord *Tenterden*, C. J. You must show that he neglected or refused. Can the defendant say that he neglected or refused? The defendant had no more right to the pulpit than his counsel.] The church was full. The lessor of the plaintiff should therefore have pursued his right by *quare impedit*, and not by ejectment. [*Bayley*, J. If the simoniacal presentee die, the King may present, because the church is never full as against the Crown.] The plaintiff ought to have put the question upon the record.

Lord TENTERDEN, C. J.—The lessor of the plaintiff had been instituted and inducted. If the church had been full, he must have proceeded by *quare impedit*. But the church here being void, and the lessor of the plaintiff being inducted, he has a right to recover in ejectment.

BAYLEY, J.—From the moment when the former party was presented simoniacally, the church was void.

Rule refused.

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A. and *B.* deposit with *C.* 20*l.* each to abide the event of a fight between them. After the battle, a dispute as to which is the winner is referred to *D.* who decides in favour of *B.* *A.* demands the whole 40*l.* from *C.*, and gives him notice not to pay it to *B.* *C.* nevertheless pays over the 40*l.* to *B.* *A.* may recover his own 20*l.* from *C.* as money received to his use.

THIS was an action brought to recover 20*l.* as money had and received by defendant to plaintiff's use. At the trial before *Holroyd*, J., at the last summer assizes for the county of Nottingham (*a*), the following facts appeared. The plaintiff and —— Wilcockson having agreed to fight, deposited 20*l.* each in the hands of defendant to abide the event. After the battle, a dispute having arisen as to which party had won, it was referred to arbitration and decided in favour of Wilcockson. Plaintiff then demanded the 40*l.*, and his brother gave defendant notice not to pay Wilcockson; notwithstanding which notice defendant paid the whole to Wilcockson. For the defendant it was contended that the action was not maintainable, inasmuch as the plaintiff had affirmed the contract, by claiming the whole money after the event. This objection being overruled, a verdict was taken for the plaintiff, damages 20*l.*, with liberty to defendant to move to enter a nonsuit. *Reader* having obtained a rule accordingly,

N. R. Clarke shewed cause. The defendant has the decisions of all the three Courts in his favour: *Smith* v. *Bickmore* (*b*), in C. P.; *Bate* v. *Cartwright* (*c*), in the Exchequer; which were founded upon *Cotton* v. *Thurland* (*d*), in this Court. Where money remains in the hands of the stakeholder, it may be recovered at any time. It is said that here the party would not rescind the contract; but the contract was altogether void; it was therefore originally money received to the use of the party who paid it. There could be no implied authority to pay over the money, by reason of the illegality of the contract; there was no express authority, because the plaintiff demanded it back. It was said, that by demanding the whole he confirmed

(*a*) Counsel for the plaintiff, *N. R. Clarke;* for the defendant, *Reader* and *Humfrey*.

(*b*) 4 Taunt. 474.

(*c*) 7 Price, 540.

(*d*) 5 T. R. 405.

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the wager. He did not, however, simply demand. He also gave notice to the defendant not to pay over to the other party. In *Bate* v. *Cartwright*, the action was brought to recover the whole; and in *Howson* v. *Huncock*(*a*), the plaintiff had expressly assented to the payment over. Where the money is actually paid over, the original assent to such payment, which accompanied the deposit, is considered as carried on to the time of the payment.—[*Bayley*, J. Suppose I bet 10*l*. you do not horsewhip *A. B.*, and I deposit the money; whether you do or do not horsewhip, can you recover it back?] The cases go to that length. The principle is, that the money is received to the use of the payer, and the receiver is liable if he pays it over without an authority express or implied. In *Busk* v. *Walsh* (*b*), the contract was rescinded before the event happened, the plaintiff having made his claim under a commission issued against the defendant before the illegal vote was determined. There the parties were *in pari delicto*. In last term there was a motion to set aside a verdict on this ground; and the Court said, if the defendant was a stakeholder, you are right, he being one of the offending parties. Here the contract was merely void. [*Bayley*, J. There two sums of 20*l*. were deposited on the event, or it was a payment of 20*l*. to have 40*l*. back, and therefore 20*l*., at all events, was gone.]

Reader and *Humfrey*, contrà. The three cases relied on, all proceed on a principle which the plaintiff does not ask the Court to disturb; but he trusts that the principle will not be extended, as persons of great authority have considered that in those cases the Court went too far. In *Busk* v. *Walsh*, Sir *James Mansfield* says, "I never could understand where was the good sense of altering the law from that which it certainly before was, that if persons entered into an illegal contract, they were not to have the aid of the law to help them out of their difficulties, but

(*a*) 8 T. R. 575. (*b*) 4 Taunt. 290.

must be left to get out of them as well as they could: but the law is now changed, so that if a man declares his dissent from an illegal wager, before the event happens, even if it is the very day before the event happens, he may recover back the money he has paid." *Cotton* v. *Thurland* (*a*) was the first case in which the law was altered. In *Lowry* v. *Bourdieu* (*b*), the rule had been stated to be *potior est conditio possidentis* (*c*). *Lacaussade* v. *White* (*d*). [*Holroyd*, J. That was not the case of a stakeholder. The decision in that case proceeded upon that mistake, and it has been since over-ruled. In *Williams* v. *Hedley* (*e*), it was fully explained.] It must be admitted, upon the three cases first cited, that if the money has not been paid over, it may be recovered. If the party gives notice that he dissents from the contract, and says that it is illegal from beginning to end, and the money after that is paid over, it is the same thing as if it remained in the hands of the party. Here 20*l.* was deposited, the battle was fought, and the dispute arose as to who was the winner. The defendant was called upon, not to pay back the plaintiff's own money, whereby the contract would have been repudiated, rescinded, or dissented from; but the plaintiff says he is entitled to the money, thereby still maintaining the contract. The Court will not enter into the question of who was the winner. [*Holroyd*, J. The winning of the battle would not have entitled either party to any thing, inasmuch as the contract was illegal. *Bayley*, J. Is not

(*a*) 5 T. R. 405. *Ante*, 209.

(*b*) Dougl. 468.

(*c*) This rule as laid down in the Digest does not provide for the case of a stakeholder. "Si ob turpem causam promiseris Titio, quamvis, si petat, exceptione doli mali, vel in factum, summovere eum possis, tamen, si solveris, non posse [te] repetere: quoniam sublatâ proximâ causâ stipulationis, quæ propter exceptionem inanis esset, pristina causa, id est, turpitudo, superesset: porro autem si et dantis et accipientis turpis causa sit, possessorem potiorem esse: et ideo repetitionem cessare, tametsi ex stipulatione solutum est." Dig. lib. xii. tit. 5. lex 8.

(*d*) 7 T. R. 535.

(*e*) 8 East, 381, n.

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the defendant bound to know how the law stands, and that he cannot legally pay over the money?] If paid over without notice, the payment would be good. [*Bayley*, J. He has no right to pay, unless he could be compelled to pay.] In *Camm* v. *Alder* (*a*), Lord *Kenyon* says, "If the defendant has paid over money, perhaps he would not be liable in this action." Lord *Ellenborough* speaks of the money as *in transitu*. In no case except *Lacaussade* v. *White* (*b*), was it ever held that, after the event, the loser of an illegal wager might recover back his money. If that case was rightly decided, it would go to the whole extent contended for; but Lord *Kenyon*'s opinion there is directly contrary to that expressed by Sir *James Mansfield* (*c*). *Howson* v. *Hancock* (*d*) shews, that where money has been paid over to the winner, it cannot be recovered in an action against him. [*Bayley*, J. There the money was paid by consent.] Nothing turned upon the consent. Lord *Kenyon* says, this is very different from the case of *Lacaussade* v. *White*, where the money was recovered from the stakeholder before it had been paid over; but this was a mistake, for *Lacaussade* v. *White* was not the case of a stakeholder. [*Bayley*, J. The concurrence of the party was one of the strong grounds relied on in that case.] It is not mentioned by the Court, though it appears in the marginal note, and is stated by the counsel. [*Bayley*, J. Though it was not expressly mentioned, the language of the Court must be understood *secundum subjectam materiam*.] Lord *Kenyon* says, there is no case to be found where, when money has been actually paid by one of two parties to the other, upon an illegal contract, both being *participes criminis*, an action has been maintained to recover it back again. If the money is paid by the consent of the loser, it is the same thing as if the payment was made by the loser himself. In *Williams* v. *Hedley* (*e*), Lord *Ellen-*

(*a*) Cited 5 T. R. 406.
(*b*) 7 T. R. 535.
(*c*) *Ante*, 210.
(*d*) 8 T. R. 575.
(*e*) 8 East, 378.

borough pointed out the mistake into which Lord *Kenyon* had fallen in supposing that *Lacaussade* v. *White* was the case of an action against a stakeholder (*a*). In *Vandyck* v. *Hewitt* (*b*), a premium paid under an illegal insurance was held not recoverable after the event, though the underwriters set up the illegality of the transaction as an answer to the loss. Admitting the plaintiff to have a *locus pœnitentiæ*, the demand came too late, *Morck* v. *Abel* (*c*). In *Lubbock* v. *Potts* (*d*), the disaffirmance was held to come too late after the battle was fought. In *Lowry* v. *Bourdieu* (*e*), *Buller*, J., says, "there is a sound distinction between contracts executed and executory; and if an action is brought with a view to rescind a contract, you must do it while the contract continues executory." That rule applies not only to legal but to illegal contracts, as the case there was. [*Holroyd*, J. There, by the terms of the contract, the party who paid the premium was never to have his money again. Here he was to have his own money back, and more."] They also cited *Tappenden* v. *Randall* (*f*), *Tenant* v. *Elliott* (*g*), *Farmer* v. *Russell* (*h*), and *Aubert* v. *Walsh* (*i*).

BAYLEY, J.—I think this rule ought to be discharged. *Tenant* v. *Elliott*, and *Farmer* v. *Russell*, do not prove the point for which they have been cited. Those cases only decide, that where money has been paid by one party to the illegal contract, to a third person, for the other party, that third person cannot set up the illegality of the contract as a defence to an action brought by the party for whose use he has received the money. Then there is a material distinction between one of the parties to the illegal contract and a *stakeholder*. Where the money has been paid by *one*

(*a*) 8 East, 381, n.
(*b*) 1 East, 96.
(*c*) 3 B. & P. 35.
(*d*) 7 East, 449.
(*e*) Dougl. 468.
(*f*) 2 B. & P. 467.
(*g*) 1 B. & P. 3.
(*h*) Ibid. 296.
(*i*) 3 Taunt. 277.

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party to the *other*, he cannot recover it back unless he can rescind the contract; but he may rescind the contract before the event is determined. This may be applicable to a great variety of cases. It was upon this principle that *Lowry* v. *Bourdieu*, *Vandyck* v. *Hewitt*, *Lubbock* v. *Potts*, and *Aubert* v. *Walsh*, were decided. If, between the parties to the illegal contract, a demand is made before a particular period, the money may be recovered back, but not otherwise. *Lacaussade* v. *White*, is the only case where there is a deviation from that principle; *perhaps* that case could not have been supported if it had been the case of a stakeholder; at all events it would then have ranked under another class of cases. It is too late now to consider what, upon sound policy, might have been the best rule upon the subject, whether a party to the illegal contract should be at liberty to recover back his money after the event is decided. If the stakeholder could have kept the money in his own pocket, that *might* have discouraged these contracts; but *Cotton* v. *Thurland*, and *Smith* v. *Bickmore*, have settled the point. It is decided that the party may recover from the stakeholder, not all the money deposited, but his own stake. *Smith* v. *Bickmore* was decided after the distinction taken between a stakeholder and a party to the contract was understood. Mr. *Reader* proceeds upon this ground, that this case will go beyond the cases of *Cotton* v. *Thurland*, and *Smith* v. *Bickmore*, as the plaintiff had (previously to the action being brought) done no act to rescind the illegal wager, nor intimated to the stakeholder that he demanded his own stake only. But if, *after notice*, you pay the money over, you pay it at your peril. I think *Howson* v. *Hancock* may be left out of the case, as there there was the consent and concurrence of one of the parties to the wager that it should be paid over to the other. *Howson* v. *Hancock*, therefore, only decides that you shall not be at liberty to recover your stake after it has been paid over with your consent; here there is notice not to pay it over. Suppose *Wilcockson* had been the winner, *he* could not have brought an action

to recover the *whole* stakes. The answer would have been, you shall not recover that which it is against the policy of the law you should recover. If you could recover it in a Court of law, that would be an encouragement to an illegal wager. Then if he could not have recovered the whole in a Court of law, he could have recovered his own stake only. If the defendant, therefore, has paid the *whole*, when he could not have been compelled to pay more than one *moiety*, and that after the plaintiff had forbidden him to pay any part of it, then the prohibition of the plaintiff was good as to his own stake. I think a decision of this kind is in furtherance of the law, as decided in *Cotton* v. *Thurland*, because though the money deposited in the hands of a stakeholder is an encouragement to go on with the fight, yet it operates as a discouragement if the stakeholder is not permitted to pay over the whole to the winner, but only his own stake.

HOLROYD. J.—I am of the same opinion as at the trial. I think the case of a stakeholder has been distinguished from all cases where money has been paid by one of the parties to the illegal transaction to the other. It seems to me that the illegal transaction is no part of the ground of action. The money has been paid to the defendant, he has no right to retain it. When the action is brought, he says I have paid it to another: this he had no right to do. I think it was sufficient for the plaintiff to give notice that if the defendant paid the money over he would bring his action. I think by giving him notice not to pay over *any part* of the money deposited, the plaintiff sufficiently prohibited him from paying over his stake.

LITTLEDALE J.—I am of the same opinion. I think that if two parties have entered into an illegal contract, before the event happens either may rescind it; if the event has happened, that cannot be done; but in the case of persons who enter into an illegal contract and deposit

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money in the hands of a stakeholder, I think the rule is, that if the event has happened, and the money has been paid over by the stakeholder, then the loser cannot recover his stake unless notice has been given; but if the event has happened, and the money is not paid over, then he may recover it, if he demands it or gives notice not to pay it over. Whether the *demand* of the plaintiff in this case would have been sufficient *alone*, I do not say, but it shews his dissent to its being paid over; at all events, the notice which he gave not to pay over the money was sufficient. I think that until the stakeholder has paid over the money, the contract is not executed.

Rule discharged.

SAVILLE *v.* LORD FARNHAM.

Where a judge directs the jury that they are clearly bound to find a verdict for one party, and no objection is taken to the entering of the verdict for that party, the Court will not grant a new trial upon the affidavit of a juryman stating that the jury had not concurred in such verdict.

THIS was a feigned issue, under an inclosure act, to try whether the plaintiff was entitled to a way over a common. At the trial, before *Bayley*, J. at the last Assizes for the county of York, before the defendant had concluded his case, the learned judge, being of opinion that the plaintiff had made out no title to the way, directed a verdict to be entered for the defendant.

Brougham now moved for a new trial upon an affidavit by the plaintiff's attorney and by one of the special jury. [Lord *Tenterden*, C. J.— Can you read the affidavit of a juryman?] Not as to the conduct of the jury, but here the affidavit of the juryman is introduced for a special collateral purpose: it states that the jury gave no verdict at all. [*Bayley*, J. I said that there must be a verdict for the defendant, and the jury said nothing.] It is sworn that the officer took down the verdict without any verdict having been given by the jury.

Lord TENTERDEN, C. J.—The jury are present when the verdict is taken, and leave the box, and no objection is taken.

Rule refused.

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The KING *v.* The INHABITANTS of SHIPTON.

A., a parish apprentice, at the suggestion of his master, *B.*, goes to work for *C.* *A.*, without the knowledge of *B.*, and without the intervention of two justices, agrees to work with *C.* by the year, & serves *C.* a year under that agreement. *A.* gains no settlement by apprenticeship, because the service is not referable to the indenture; nor by hiring and service, because he was an apprentice illegally put away within 56 *Geo.* 3, c. 139, s. 9.

UPON an appeal against the order of two magistrates, dated 14th May, 1827, whereby *William Partridge* and *Anne*, his wife, were removed from the parish of Dudley, in the county of Worcester, to the parish of Shipton, in the county of Salop, the Quarter Sessions for the county of Worcester confirmed the order, subject to the opinion of the Court of King's Bench upon the following case:—

The pauper *William*, at the age of thirteen years, was, under indentures bearing date the 3d of September, 1816, put out an apprentice, until his attainment of the age of twenty-one years, by the officers of the parish of Stanton Long, in the county of Salop, with the consent of two magistrates in the usual manner, to John Taylor, who occupied a farm in the said parish. After the pauper *William* had been some months at his master's farm, Taylor, not having sufficient work for him, asked him if he would go over to a farm called the Moorhouse, in the parish of Shipton, to drive the plough. The pauper *William* said he had no objection, and immediately packed up his clothes and went accordingly. The Moorhouse was in the occupation of a Mrs. Corser, the sister of Taylor, whose husband was a lunatic and incapable of superintending the management of his farm. Taylor occasionally, about once a fortnight, went over from his residence at Stanton Long to the Moorhouse, a distance of a mile, and gave his advice and opinion to his sister respecting the proper management of her farming affairs. He also gave orders to her servants, but does not know that he ever gave orders to the pauper *William*, after he had been sent to Moorhouse as before mentioned. Taylor never told the pauper *William* that he might hire himself or make any engagement with Mrs. Corser, but retained possession of the indentures of apprenticeship, and produced them in Court on the trial of the appeal. No agreement or bargain was ever made between Taylor and

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his sister respecting the services of the pauper *William*. On the arrival of the pauper *William* at the Moorhouse, Mrs. Corser asked if he would stay and drive the plough for his meat and drink for a twelvemonth. He replied that he would, and she sent him to the field to drive the plough. For his services at the Moorhouse for the first and second year the pauper *William* was not paid any money, but was found in clothing (except a pair of shoes and some stockings) and in meat and drink by Mrs. Corser. At the end of the second year he hired himself for a year to Mrs. Corser for 5*l.*, and served that year, and received the full amount of his wages. When that period had expired, he hired himself again for a year for 6*l.*, and received that sum on the completion of the year.

During the time that the pauper was in the service of Mrs. Corser, which was four years and four months, he never received any orders from Taylor, nor did he ever return to Taylor's farm after he first quitted it as before stated. No assignment of the indentures was made, nor was the consent of any magistrate obtained for placing the pauper *William* with Mrs. Corser. When he had been two years at Mrs. Corser's, Taylor became insolvent, and quitted his farm, after which he ceased to have any thing to do with the Moorhouse, and saw no more of the pauper *William*. Before Taylor's insolvency, and whilst the pauper *William* worked at the Moorhouse, Taylor, on the application of the pauper *William*'s mother, furnished him with some shoes; and, on another occasion, supplied him with some wool to make stockings for him. He also employed a surgeon to attend him whilst labouring under a complaint, and paid his bill. When the pauper *William* left the Moorhouse, the term of his apprenticeship had not expired. The question for the consideration of the Court is, whether this apprentice had not been put away and dismissed from the service of his master, within the meaning of s. 9 of 56 *Geo.* 3, c. 139, which came into operation on the 1st of October, 1816, so that he could not obtain a settlement

in Shipton by means of his service there; or, whether the service in Shipton was by law a service under the indenture of apprenticeship, so as to confer a settlement in that parish.

F. Pollock and *Wallinger*, in support of the order of sessions. By 32 *Geo.* 3, c. 57, s. 7, the master of any parish apprentice is authorized to assign such apprentice to any person willing to take such apprentice for the residue of the term with the consent of two justices. This has been described as a restraining statute, inasmuch as it impliedly prohibits any assignment to which two justices are not consenting parties, which assignment would have been good at common law. And by 56 *Geo.* 3, c. 139, s. 9, it is enacted, that it shall not be lawful for any master to put away or transfer any parish apprentice, or in any way discharge or dismiss him from his service, without such consent of justices; and that no settlement shall be gained by any service of such apprentice after such putting away or transfer, unless such service shall have been performed under the sanction of such consent as aforesaid. Here it is found that Taylor, the master, gave orders to the servants, and those orders would necessarily include what the pauper was to do. If a man was ordered to plough, the pauper would drive the plough with him. By 56 *Geo.* 3, c. 139, s. 10, any person who shall put away or transfer any parish apprentice to another, or who shall in any way discharge or dismiss from his service any parish apprentice without such consent, shall forfeit a sum not exceeding 10*l.* for every apprentice so transferred. Sending an apprentice to do work in another parish, to enable him to become a more useful member of society, could not subject the party to the penalty. And yet if no settlement is gained by reason of the prohibition in the statute, the penalty would be necessarily incurred. The word "assignment" means, ex vi termini, a parting with the whole interest of the assigned. Thus an underlease was held not to be a putting

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away of the estate (*a*). The case of *The King* v. *Whitchurch* (*b*) is very distinguishable. There the master did not know where the apprentice was going, or who it was that he served.

Campbell and *Godson*, contrà. No settlement was gained by a service in the parish of Shipton under the apprenticeship, independently of the statute 56 *Geo.* 3, c. 139, because the service with Mrs. Corser was not under the indenture. It may be admitted that the 32 *Geo.* 3, c. 57, is an enabling statute. But here the provisions of that statute have not been complied with. *The King* v. *Whitchurch* is directly in point. In the present case there was a new hiring, and therefore the service cannot be referred to the apprenticeship. In *The King* v. *Whitchurch*, the main ground upon which the decision proceeded was, that the service had been under the contract. Here it cannot be said that this was not a service under the contract. It cannot be a good settlement by hiring and service where there is a valid subsisting apprenticeship. This is what it was the express intention of the statute to prevent. Confidence is placed in the master for kind treatment and for attention to morals. [Lord *Tenterden*, C. J. There should be the consent of magistates to each service.] The words of the statute are, "shall not put away OR transfer, or in any way discharge or dismiss."

Lord TENTERDEN, C. J.—I am of opinion that the justices have come to a wrong conclusion, whether the case be considered with reference to the statute 56 *Geo.* 3, c. 139, or not. It is contended, that a settlement was gained by a service in Shipton under the apprenticeship; but if during the contract of apprenticeship the pauper hires himself to another person, no settlement is gained by the subsequent service, inasmuch as such service is not referable to the in-

(*a*) Crusoe *v.* Bugby, 3 Wils. 234. (*b*) 2 D. & R. 845, 1 B. & C. 574.

denture, but to the hiring, under which he would have gained a settlement, if he had not, as an apprentice, been under a legal incapacity to enter into such a contract. Then, under the provision of the statute, no settlement was gained. The 32 *Geo.* 3, c. 57, recites, "that it frequently happens that persons are compellable to take a greater number of parish apprentices than it is convenient for them to maintain or employ in their own families, and that they are therefore forced to place out or assign over such apprentices to other persons, and that it is proper that such assignment should be legally made under the inspection and control of the magistrates;" and it then enables masters to assign, but requires that such assignment "shall be by indorsement on the indenture, with the consent of the magistrates." After which the apprentice is to be deemed and taken to be the apprentice of such assignee. Here an intermediate course has been adopted, not by assigning but by placing with some other master. The 56 *Geo.* 3, c. 139, s. 9, recites, "that it may be expedient that those to whom parish apprentices are bound or assigned, should be empowered to place out or assign over such apprentice to others, and that it is proper that such placing out or assignment should, in all instances, be under the inspection and control of the magistrates; and that it is fit that the person to whom such putting out or assignment shall be made, and also the apprentice shall be made subject to the ordinary jurisdiction of justices of the peace, with respect to masters and parish apprentices; and that it is inexpedient that any master should in any way discharge or dismiss from his service any parish apprentice without the consent of such justices;" and then enacts, "that it shall not be lawful for any master to put away or transfer," that is, either one or the other, "any parish apprentice to any other, or in any way to discharge or dismiss from his service any parish apprentice, without such consent of justices as is directed in the former act." No specific mode is here pointed out by which the justices are to express their consent to the putting away, discharging, or dismissing, as is

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done by 32 *Geo.* 3, c. 57, with regard to assignments.—In this case there was no regular assignment, but a putting away and dismissal; and that being without the consent of justices, no settlement was afterwards gained.

BAYLEY, J.—*The King* v. *Whitchurch* establishes that when an apprentice serves a third person, without the express assent of his master, and without such third person's being aware of the apprenticeship, no settlement is gained under the service. Here it does not appear that Mrs. Corser knew that the pauper was an apprentice. He served her, therefore, under the contract of hiring, without reference to the apprenticeship. I think, that, upon 56 *Geo.* 3, c. 139, the pauper was prevented from gaining a settlement in Shipton. The object of the legislature was to protect children whilst under the control of their masters. We shall best carry into effect that provision by supporting the authority of the justices in the exercise of a proper control over the masters. We are therefore bound to require the concurrence of the magistrates. The object of the legislature might be otherwise defeated. In the recital in 32 *Geo.* 3, c. 57, s. 7, the words "place out or assign" occur, but unfortunately the words "place out" are dropped out in the enacting clause, which speaks of *assigning* only. We ought to understand these words in distinct senses if possible. The term "assigning" applies only to a parting with the whole term. But here it was meant to prevent the placing out, as well as an assignment; as that would equally place the apprentice under the actual control of a stranger.

HOLROYD, J.—No settlement was gained in Shipton by service under the indenture. The service performed in Shipton was not under the indenture. Besides which, under 56 *Geo.* 3, c. 139, no settlement could be gained after the putting away of the apprentice to Mrs. Corser, without the consent of the justices.

Order of Sessions quashed.

The KING v. The INHABITANTS of WAYNFLETE ALL SAINTS.

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Under 59 *Geo.* 3, c. 50, where the settlement rests upon the renting of land of 10*l.* a year, the residence in the parish need not be for more than 40 days; nor is it required to be on the land.

UPON an appeal against an order of two justices for the removal of *B. Markwell*, his wife and children, from the parish of Waynflete All Saints, in the parts of Lindsey, in the county of Lincoln, to the parish of Horncastle, in the same parts and county, the sessions quashed the order, subject to the opinion of this Court on the following case.

The pauper, *B. Markwell*, previously to Lady-day, 1822, hired from his wife's mother seven acres of land in Horncastle, which she then rented, at the yearly sum of 8*l.* 1*s.* 6*d.* and for which the pauper agreed to pay her the same rent, and three shillings per week in addition; his tenancy to commence from the ensuing Lady-day. No time was specified for which the pauper was to take the land, but he occupied it from Lady-day, 1822, for three years, and paid the several rents as they became due; and he resided and slept in a house in Horncastle for upwards of forty days and nights, in the year immediately subsequent to Lady-day, 1822. The question for the opinion of the Court is, whether this taking, followed by the occupation stated, is sufficient within the 59 *Geo.* 3, c. 50, to entitle the pauper to a settlement in Horncastle.

Clarke and *Hildyard* in support of the order of session. This case must go back to be restated. It was for the Court of Quarter Sessions to find whether the pauper rented land of the yearly value of 10*l.* or not. [*Bayley*, J. If when you saw the case you had made a special application by affidavit, the other side would have had an opportunity of answering you; but now the case has found its way into the paper, and we must dispose of it as it is.] The object of 59 *Geo.* 3, c. 50, was to put an end to nice questions upon the law of settlement by renting tenements. *Rex* v. *St. Mary-le-Bone* (*a*). There should be a permanent

(*a*) 4 B. & A. 681.

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residence—[*Bayley*, J. What is there in the act which requires permanent residence? It would rather look that if you dwelt forty days upon the tenement, it was sufficient.] Here the pauper does not reside on the tenement. The word "dwelling-house" means the house in which the party ordinarily resides. A man may have land in three parishes, and may have slept forty nights in each; in that case the question might be, where he slept the last night. This difficulty would be got rid of by holding that the usual residence of the party must be on the tenement. The finding implies that the party meant to take by the year, but the mother-in-law could not let for a year unless her estate commenced at the same period of the year. [*Bayley*, J. She had a defeasible estate. Suppose tenant for life demises for years, would not the lessee be tenant for years? *Littledale*, J. We must presume that she was entitled to hold on. *Bayley*, J. If she took upon herself to demise generally, and her landlord did not determine her estate, the demise would be good. *Holroyd*, J. In almost all leases there is a clause of re-entry, which makes the interest defeasible.]

Clinton, contrà, was stopped by the Court.

BAYLEY, J.—The mother-in-law has an estate which she rents at 8*l.* 1*s.* 6*d.* The pauper agrees to pay her the same rent, and three shillings a week in addition. He was a tenant at a yearly rent. *Primâ facie*, therefore, he must be taken to be tenant from year to year. The presumption of law which attaches is fortified, where the taking is of *land*, which is of different value at different times of the year. The interest would extend beyond the year, unless something takes place to determine it. The other objection is, that the pauper did not reside a full year. Before 59 *Geo.* 3, c. 50, residence for forty days on one tenement of 10*l.*, whether house or land, would have gained a settlement. That was the object to be guarded against. By

that statute, after reciting that many disputes and controversies had arisen respecting the settling of poor people by the renting of tenements, enacts, that no person shall acquire a settlement *by reason of his dwelling for forty days in any tenement* rented by such person, unless such tenement shall consist, &c. The statute does not seem to make any alteration as to the forty days. Then of what is the tenement to consist? Of a house or building, *or* of land, (not *and* land,) or of both. You must have either a house or land, or both. If you have any one of these three qualifications, the requisitions of the act in this respect are complied with. But the statute goes on to say, you shall not gain a settlement unless you actually hold the *land* and occupy the *house*. It is sufficient if you hold the land while the tenancy continues; it is not necessary to occupy. It does not appear to be necessary that a party should continue his residence within the parish all the year, provided he rents for the whole year.

HOLROYD, J.—The pauper gained a settlement in Horncastle. There was a clear renting for a year.

LITTLEDALE, J.—I entertain no doubt upon either of these points. The case shews a renting for a year, and there is nothing to shew that the mother-in-law's interest was defeated. If she had received notice to quit, it should have been so found. She paid a sort of ground rent. The act could never mean that the party should reside on land without a house.

Order of Sessions quashed (*a*).

(*a*) And see *Rex* v. *Great Bolton*, *post* 227.

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JOHNSON *v.* HOWSON.

Under not guilty, in trespass *quare clausum fregit*, the defendant may entitle himself to the possession as plaintiff's mortgagee for years, or as the lessee of such mortgagee.

TRESPASS *quare clausum fregit*. Plea—Not Guilty. At the trial, before *Alexander*, C. B., at the last Assizes for the county of Lincoln (*a*), it was proved, on the part of the plaintiff, that he had been long in possession of the close in question; that the defendant came to the close and locked up the gate, and threatened to transport the plaintiff's servant if he intermeddled with the growing crops, and that the defendant afterwards carried away the crops to the value of 62*l*. The defendant proved a mortgage to one Dent for 1000 years, and a demise from Dent to the defendant. It was objected, on the part of the plaintiff, that although a freehold in the defendant, or in a third person (*b*), might be given in evidence under the general issue, yet that this mortgage title being only for a term of years ought to have been specially pleaded. The learned Judge being of a contrary opinion nonsuited the plaintiff, but gave leave to move to enter a verdict for 60*l*.

Reader now moved upon the liberty reserved, and attempted to support the same distinction (*c*), which he had taken at the trial.

BAYLEY, J.—A defendant cannot plead a possessory title without giving colour (*d*), because such a plea would amount to the general issue.

(*a*) Counsel for the plaintiff, *Reader* and *N. R. Clarke*; for the defendant, *Denman* and *Balguy*.

(*b*) *Argent* v. *Durrant*, 8 T. R. 403.

(*c*) Any distinction seems to be rather in favour of the defendant; for the original case in 25 *H.* 8, (*Bro. Abr.* General Issue, pl. 81,) which was relied upon by the plaintiff's counsel in *Argent* v. *Durrant*, is this: "In assize or trespass, if a man entitles a stranger and justifies by his command, this ought to be pleaded, and not given in evidence, upon *nul tort*, or not guilty pleaded; so of common, rent service, rent charge, licence *et hujusmodi*. These ought to be pleaded, and not given in evidence upon the general issue; *contrary of lease of land for years.*"

(*d*) 8 T. R. 406. S. P.

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HOLROYD, J.—Where a defendant having title enters, he is the legal possessor.

Lord TENTERDEN, C. J.—The mortgagee has the possessory right, and resumes that right by actual entry (*a*). He has the right to take possession; since he has taken possession, can he be a trespasser?

BAYLEY, J.—Where a defendant is bound in a special plea to give colour, he may avail himself of his matter of defence under the general issue (*b*).

Rule refused.

(*a*) Such an entry being the *resumption* of a right, the party is in by relation to the period when his right of entry accrued. *Vide ante*, 1 M. & R. 221, (*c*).

(*b*) The rule here laid down appears to apply as well to cases in which express colour is necessary, as to those in which the defendant is excused from giving express colour by reason of his claiming under the plaintiff himself, (10 Co. Rep. 91 a, in Doctor *Leyfield's* case; Doct. Pla. 78,) as in the principal case.

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Under 59 *Geo.* 3, c. 50, (and before the passing of 6 *Geo.* 4, c. 57,) a settlement was gained by holding for one year, at a rent of 11*l.*, a dwelling-house, part of which was let at 1*s.* 6*d.* a week to an undertenant, who had no means of access to the rest of the house.

UPON an appeal against the order of two justices, whereby *Lucy Hall*, single woman, was removed from *Great Bolton*, in the county of Lancaster, to Little Bolton, in the same county, as the place of her settlement derived from her mother, Mary Hall, the sessions discharged the order, subject to the opinion of this Court on the following case:—

The pauper's mother, Mary Hall, being a widow, went to reside in Little Bolton in May, 1823, where she hired a house, consisting of six rooms and a cellar, and being a separate and distinct dwelling house, for a year, and from year to year, at the annual rent of 11*l.*; and she continued to hold such house, and actually paid the said rent for the same for the space of two years and upwards. Before she went to live in the house, but after she had hired it and put some

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of her furniture into it, she underlet to one Clough the cellar under the house at 1*s.* 6*d.* per week, and he occupied the cellar during the whole of Mary Hall's tenancy. The cellar was let unfurnished, and Clough occupied nothing but the cellar. The cellar communicated with the street by an outer door, of which Clough kept the key; and at the time Mary Hall took the house the cellar communicated with the room above in the house, by means of a step ladder and a trap-door, but when she went to live in the house she took away the step-ladder, which she placed in one of the higher rooms of the house, and shut the trap-door, expressly for the purpose of preventing any communication between the cellar and the rest of the house. The trap-door was not fastened, except that the furniture of the house was placed upon it, as upon other parts of the room-floor. The trap-door was never used by the cellar tenant, or by Mary Hall. When the cellar was underlet to Clough there was no fire-grate in it, and soon afterwards Clough applied to Mary Hall for a grate to be put up in the cellar. Mary Hall furnished the grate at her own expense, and it remained there until she left the house, when she sold the grate to Clough, who paid her for it. The pauper lived with her mother, as part of her family, in this house during the whole of her tenancy.

The question for the opinion of the Court is, whether the pauper's mother, on whose settlement that of the pauper depends, gained a settlement in Little Bolton under the 59 *Geo.* 3, c. 50.

Coltman, in support of the order of sessions. By 59 *Geo.* 3, c. 50, it is enacted, that no person shall acquire a settlement in any parish or township maintaining its own poor in England, by or by reason of his or her dwelling for forty days in any tenement rented by such person, unless such tenement shall consist of a house or building within such parish or township, being a separate and distinct dwelling-house or building, or of land within such parish or town-

ship, or of both, bonâ fide hired by such person, at and for the sum of ten pounds a year, at the least, for the term of one whole year, nor unless such house or building shall be held, and such land occupied, and the rent for the same actually paid, for the term of one whole year at the least, by the person hiring the same. In *The King* v. *North Collingham* (*a*), it was considered that underletting to a mere lodger did not prevent the whole house being so held as to confer a settlement; but, in that case, the distinction is taken between the case of a lodger, and that of an under-tenant occupying part of the house as a distinct tenement. Lord *Tenterden* there says (*b*), "Did the pauper hold the *whole* dwelling-house? It is said that the lodger held a part distinct from the rest, so that a burglary committed in that part might in an indictment be laid to have been committed in the dwelling-house of the lodger. I think, however, that that proposition is not established by the facts stated; it is said, that putting the key of the inner door into the hands of the lodger was the same thing as if there had been a brick wall between his and the adjoining room; if, indeed, it had been stated that the key was delivered to the lodger for the express purpose of preventing communication between the different apartments, there would be (there might have been (*c*)) more weight in the argument." Here the fact wanted in *The King* v. *North Collingham* is expressly found. And even there Mr. Justice *Bayley* says, "The sessions might have found it a separate holding." *The King* v. *Tonbridge* (*d*) will be relied upon on the other side; but that case merely decides negatively, that where land is underlet no settlement is acquired. [*Bayley*, J. The statute requires the house to be held, the land to be occupied. In *The King* v. *Tonbridge* it was held, that a settlement was not gained in respect of land where the pauper had underlet part of the land.]

(*a*) 2 D. & R. 743. 1 B. & C. 578.

(*b*) 1 B. & C. 583, 584.

(*c*) 2 D. & R. 749.

(*d*) 9 D. & R. 128. 6 B. & C. 88.

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Courtney, contrà. Every requisite of the statute is found *totidem verbis* in this case. In the judgment of Lord *Tenterden*, in *The King* v. *North Collingham*, his lordship merely says, that there would be more weight in the argument. In that case it was not necessary to give any opinion upon the point now in question; and in *The King* v. *Tonbridge*, the Court was not called upon to decide upon the case of houses, which was not before them.

Lord TENTERDEN, C. J.—The safest course, in the construction of this or of any other statute, is to give effect to the different words contained in it; otherwise we must suppose different words to be used in the same sense. In the case of a house, it is therefore sufficient if it is held, in the case of land it must be occupied.

Order of Sessions quashed. (*a*)

(*a*) But now, by 6 *Geo.* 4, c. 57, it is required that "the house or building or land shall be *occupied*."

REX v. The INHABITANTS of BIRMINGHAM.

The marriage of a minor by licence, without the consent required by 4 *Geo.* 4, c. 75, s. 16, is valid.

A female pauper married by the fraudulent contrivance of parish officers acquires her husband's settlement.

UPON an appeal against the order of two justices for the city and county of the city of Coventry, whereby *Luke Smith* and *Elizabeth Smith* his wife were removed from the united parishes of St. Michael and the Holy Trinity, in the city and county of the city of Coventry, to the parish of Birmingham, in the county of Warwick, the Court of Quarter Sessions confirmed the order, subject as to so much of the order as respects the settlement of *Elizabeth Smith*, therein described as the wife of *Luke Smith*, to the following case:

The pauper, *Luke Smith*, was married to *Elizabeth Smith*, then Elizabeth Bratt, in the year 1826, by licence, he then being a minor under the age of 21 years, and hav-

ing his father then living, who did not consent to his said marriage. It was objected by the appellants, that his marriage was void under the new Marriage Act, 4 *Geo.* 4, c. 76, for want of the father's consent. The objection was overruled by the Court. The appellants then offered evidence to prove, that, at the time of said marriage, *Elizabeth Smith*, then Elizabeth Bratt, was settled in and chargeable to the parish of Little Packington, and that the marriage was effected and brought about by a fraudulent contrivance and conspiracy of the overseers of the parish of Little Packington, for the purpose of changing the settlement of *Elizabeth Smith*, then Elizabeth Bratt, from the parish of Little Packington to the parish of Birmingham, in which *Luke Smith* was then settled. The Court of Quarter Sessions refused to admit the evidence, and confirmed the order of removal, subject to the opinion of the Court of King's Bench, first, upon the validity of this marriage within the provisions of the statute 4 *G.* 4, c. 76; secondly, upon the propriety of the rejection of the above-mentioned evidence.

Amos and *Hill*, in support of the order of sessions.—The marriage in question would be good at common law. If, therefore, it is void at all, it must be so under the provisions of some statute. The only acts applicable to this subject are 26 *Geo.* 2, c. 33, 3 *Geo.* 4, c. 75, 4 *Geo.* 4. c. 17, and 4 *Geo.* 4, c. 76. Of these, the first and third are repealed. The second was passed expressly for the purpose of preventing the evils and injustice which the preamble declares to have resulted from the operation of the 26 *Geo.* 2, c. 33, by which marriages like the present were rendered invalid. The respondents, therefore, must rely on the last act in support of their case; and it must be admitted, that such marriages are contrary to the regulations of the 16th section, and subject the parties to the disabilities set forth in the 23d section: but there is a distinction between the effect of omitting that which is merely matter

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of regulation, and of omitting that which is matter of substance; the latter avoids the marriage, the former only subjects the offending parties to penalties. In Haggard's Reports, Lord *Stowell* frequently takes the distinction between impedimentum *dirimens* and impedimentum *impeditivum*. The 22d section enumerates the cases in which marriages shall be void, but does not include the present among them. On the contrary, it contemplates the possibility of a valid marriage in breach of the regulations of the act, between persons in the situation of the paupers, and inflicts certain penalties on parties disobeying them. It also goes on to provide for the children of the marriage, which is in itself a strong presumption that such children are not illegitimate. It is therefore clear, that on the construction of the 4th *Geo.* 4, c. 76, considered by itself, this marriage is not invalid. But if the construction of that act were doubtful, it would be aided by the legislative opinion so strongly expressed in 3 *Geo.* 4, c. 75, against the policy of making void such marriages as the one in question. Upon the second point, that evidence ought to have been admitted of the fraud of the overseers in bringing about this marriage, such evidence was properly excluded, inasmuch as no fraud on the part of the overseers could have the effect of invalidating the marriage. The respondents cannot avail themselves of decisions in cases of conspiracy, because the act of the parties might amount to a conspiracy, whether the marriage effected by it were valid or not. But the language of the indictments in those cases may be referred to, for the purpose of shewing that the marriages themselves were, in those cases, considered to be valid. Thus, in *Rex* v. *Watson* (*a*), an information was granted against the defendant for procuring one Vine, a soldier, who had a settlement in the parish of Brill, to marry a poor woman, who was an idiot and chargeable to the parish of Dorton, by giving Vine 10*l.* and a fat hog for marrying her, whereby she and her child became chargeable to Brill. So

(*a*) 1 Wils. 41.

in *Rex* v. *Tarrant* (*a*). Here no force or fraud was exercised upon the individuals. [Lord *Tenterden*, C. J. Upon this point we will not trouble you; it is difficult to say, that if the marriage is valid in other respects it could be invalidated by the fraud of other parties, and thus cause a separation of the husband from the wife.]

Goulburn, contrà.—Mr. Nolan cites Dalton to shew that no settlement brought about by fraud should be considered valid. Const certainly makes a distinction as to marriage, and it must be admitted that the inconvenience pointed out by the Court of separating husband and wife might arise. No case has, however, been decided, that a marriage so obtained will confer a settlement. [Lord *Tenterden*, C. J. Will it not come to this, that the Court will interfere to prevent the effect of fraud where its interference will not break in upon something much higher? *Bayley*, J. Mr. Nolan also seems to consider that marriage is excepted.] Upon the other point, namely, the validity of the marriage, the 14th section of 4 *Geo.* 4, c. 76, is directory only, but the 16th section contains much stronger language, and it seems to have been the intention of the legislature to distinguish marriages solemnized without such consent, from the marriages mentioned in the 14th section. The 16th section seems intended to restore the authority of 26 *Geo.* 2, c. 33, s. 11. The words of the 23d section, "if any valid marriage solemnized by licence," shew, that the legislature contemplated that a marriage solemnized by licence might possibly be invalid.

Cur. adv. vult.

Lord TENTERDEN, C. J.—We are all of opinion that this was a valid marriage. By 26 *Geo.* 2, c. 33, s. 11, such a marriage would have been void, but 3 *Geo.* 4, c. 75, s. 1, repeals that provision in the former statute with reference to any marriage to be thereafter solemnized. The 8th section

(*a*) 1 Bott, 338.

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of 3 *Geo.* 4, c. 75, contains the restriction which is substituted in lieu of that imposed by the first act. Thus the law stood when the 4th *Geo.* 4, c. 17, passed. It may be a question whether so much of the statute of 3 *Geo.* 4, as respects that part of 26 *Geo.* 2, c. 33, which is recited in 3 *Geo.* 4, c. 75, s. 1, is repealed by 4 *Geo.* 4, c. 17. By 4 *Geo.* 4, c. 76, s. 1, so much of 26 *Geo.* 2, c. 33, as was in force immediately before the passing of that act, and also 4 *Geo.* 4, c. 17, were repealed, save and except any acts, matters, or things done under the provisions of the said recited acts, save also and except so far as the said recited acts repeal any former act, or any matter, clause, or thing therein contained, except where its provisions may be repugnant to the 4th *Geo.* 4, c. 76; and as it is clear that the 3d *Geo.* 4, contains nothing which can by possibility affect the validity of the marriage, the question must depend entirely on the construction of the last statute, viz. 4 *Geo.* 4, c. 76, which provides (sect. 14) in what manner licences shall be obtained; and directs, that if there be no person having authority to give consent, it shall be lawful to grant a licence notwithstanding the want of consent. The 16th section directs what parties shall have authority to give consent, and requires such consent for the marriage of parties under age, unless there shall be no person authorized to give such consent; but the statute does not proceed to make the marriage void. The 22d section declares what marriages shall be void, and this is not amongst them. This section not having the words "without consent," the case turns upon the 16th section. If any doubt remained, it would be removed by the 23d section, which enacts, that if any valid marriage, solemnized by licence, shall, after the 1st day of November next, be procured by a party to such marriage to be solemnized between persons, one or both of whom shall be under the age of twenty-one years, not being a widower or widow, contrary to the provisons of this act, by means of such party falsely swearing as to any matter or matters to which such party is hereinbefore required per-

sonally to swear,—what then?—not that the marriage shall be void, but that, in every such case, it shall be lawful for his Majesty's attorney-general, by information, &c., to sue for a forfeiture of all the estate, right, title, and interest, in any property which hath accrued, or shall accrue, to the parties so offending by force of such marriage, and such Court shall have power in such suit to declare such forfeiture, and thereupon to order and direct, that all such estate, &c. as shall then have accrued, or shall thereafter accrue, to such offending party, by force of such marriage, shall be secured by the direction of such Court for the benefit of the innocent party, or to the issue of the marriage. The legislature here speaks of the marriage as of a subsisting marriage, and of the children as the issue of the marriage. It would not have directed property to be settled on illegitimate children.

BAYLEY, J.—There is a mistake in Mr. Nolan's book in supposing that the 4th *Geo.* 4, c. 17, is entirely repealed by the 4th *Geo.* 4, c. 76.

Order of Sessions confirmed (*a*).

(*a*) Vide Note A., at the end of this volume, as to the peculiar state of the law of marriage in England.

RICHMOND *v.* SMITH.

A guest at an inn directs valuable goods to be placed in the public room. If the innkeeper do not require them to be removed to a safer place, he is liable as an insurer, in the event of the goods being stolen.

CASE against an innkeeper for the loss of pieces of silk brought by the plaintiff as a guest to the defendant's inn. At the trial before the Lord Chief Baron at the last assizes for the county of Nottingham, it appeared, that on the plaintiff, who is a dealer in silks, setting out from London on a journey, his clerk had packed up goods to the value of 20*l.* in a carpet bag. On the plaintiff's arrival at Nottingham all his packages were taken out of the coach, and the defendant's servants were going to take them up stairs. The plaintiff went into the public room and said to the servants, "Don't take up the carpet bag, but leave it in

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the room, I may have occasion to send it to different people in the town." The carpet bag was accordingly left in the public room, and was from time to time sent out to different persons for inspection, and some of the articles were sold. There was no lock to the bag. The plaintiff went to Derby, and took the bag with him. He came back to Nottingham the same day. The defendant's porter was going to take the bag up into plaintiff's bed-room; upon which the plaintiff said, "leave it in the public room, it is safe enough." After this the plaintiff went into the town, leaving no person in the public room; and during his absence the bag was stolen. Every person in Nottingham might come into this room. The plaintiff, upon discovering the loss, exclaimed, "It is well the parcels up stairs were not taken; this was only worth 30*l.*" Upon this evidence it was objected, that there was no case to go to the jury. The learned Judge said, that an innkeeper must be considered as an insurer, and bound to give special notice that he does not mean to be answerable, although the guest takes the goods under his own care. The plaintiff recovered a verdict for 50*l.* which

Clarke now moved to set aside. It has been held, that where a party chuses to take the key of his room, the innkeeper is not liable, *Burgess* v. *Clements* (*a*). That case could never have been so decided, if it had been considered that an innkeeper was in the situation of a carrier. The defendant's counsel would not have addressed the jury if he had anticipated that the law would have been so laid down by the learned Judge. Then there was no evidence of the amount of the plaintiff's loss, except that arising from his own exclamation (*b*), which went only to 30*l.* The plaintiff had been travelling about and selling his goods since they were packed in London.

(*a*) 4 M. & S. 306; Holt, N. P. C. 24 n.; 1 Stark. N. P. 251 n. But in that case there was negligence in the plaintiff.

(*b*) Vide *Down* v. *Halling*, 6 D. & R. 455, 4 B. & C. 330.

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Lord TENTERDEN, C. J.—I am of opinion that no ground has been laid for a rule for a new trial, on account of misdirection. At common law, if a person brings goods to an inn as a guest, the innkeeper is liable for the safe custody of those goods. The plaintiff directed that the goods should not be taken up stairs. If the innkeeper meant not to be liable unless the goods were taken up stairs, he should have said to the plaintiff, "If you put your goods into the public room, they will be at your risk."

BAYLEY, J.—An innkeeper stands on the same footing as a carrier (*a*). If a guest takes goods under his own care, and withdraws them from the custody of the innkeeper, the latter is discharged. Here the plaintiff merely says, "Take the goods into the public room."

HOLROYD, J.—I think that the liability of an innkeeper stands upon the same footing as that of a public carrier. There is an old case in which it was held that the innkeeper was not discharged, under circumstances resembling the present (*b*).

Rule refused. (*c*)

(*a*) "Eodem modo (scil. quo et vectores) tenentur CAUPONES et stabularii quo exercentes negotium suum recipiunt; cæterùm si extra negotium receperint, non tenebuntur." *Dig.* lib. 4, tit. 9, lex. 3, § 2.

(*b*) P. 42 E. 3, fo. 11, pl. 13. "The plaintiff brought goods into the defendant's inn, which were embezzled by bad people, from default of proper care, &c. Plea, that the plaintiff did not deliver the goods to the defendant, and also that plaintiff had the key of his room. *Non allocatur.* Judgment on demurrer for the plaintiff. And the *Court* taxed the damages. An elegit was awarded of the lands which defendant had on the day of the judgment, and not on the day of the writ purchased, as the plaintiff had prayed. The plaintiff prayed *capias ad satisfaciendum*, which was denied, for the defendant committed no tort, but laches."

In H. 11 *H.* 4, fo. 45, pl. 18, it was said by the Court, and admitted by the plaintiff's counsel, that the delivery of the keys made no difference. And see Calye's case, 8 Co. Rep. 33, fourth resolution.

(*c*) Vide Jones on Bailments, p. 92.

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GIBBINS and another, surviving Assignees of WILLIAM ASTON, a Bankrupt, *v.* PHILLIPS, Esquire, Sheriff of Staffordshire.

In trover against the sheriff, whose officer has seized the goods of *A.* as under a *fi. fa.* against *B.*, it is sufficient to produce the warrant without producing the writ; and it lies upon the defendant to shew that no such writ issued.

Where a mistaken verdict was given in consequence of the omission of the Judge to draw the attention of the jury to a material feature in the case, the Court imposed the terms of the payment of costs on the granting of a new trial, the Judge not having been requested to enter into a fuller explanation. But the costs of a former trial, where the verdict was set aside for misdirection, and of an intermediate postponement by making the cause a remanet, were to abide the event.

TROVER for goods alleged to have been wrongfully taken in execution at the suit of Bishton and Underhill, by whom the defendant was indemnified. First count, on the possession of the bankrupt; second, on the possession of the assignees. This cause was first tried before *Burrough*, J., at the summer assizes for the county of Stafford, 1826, when a verdict was found for the defendant, which was set aside without argument, on the ground of misdirection (*a*). At the second trial before *Littledale*, J., at the summer assizes, 1827, the facts appeared to be these. *Aston* carried on very extensive coal and iron works at several different places in the county of Stafford. He had a house at Shakerley, and his principal office was at Goldshill. In December, 1825, he began to be irregular in his payments, and on the 9th of February, 1826, his dishonoured acceptances exceeded 4000*l.* About this time *Aston* said to his clerk, "I am afraid there is nothing to be done but to come to a dead stand-still." The clerk then prepared a list of debts due from *Aston*, which amounted to 12,000*l.*, exclusive of bills running, and 26,000*l.* owing to his bankers at Stourbridge. On the 12th of February *Aston* went to London without leaving funds to satisfy the creditors who called during his absence. On the 23d of February he proceeded to London again, for the alleged purpose of obtaining a loan from Government. *Aston* had

(*a*) The learned Judge told the jury, that the only question for them to try was, whether the bill of sale was given in contemplation of bankruptcy.

entered into a bond to *Gibbins* & Co. for 42,500*l.*; and a doubt being entertained whether upon their security he was primarily liable, the opinion of counsel was taken on his behalf. The opinion, which confirmed his liability, was communicated to *Aston* by Parker, his attorney, on the 8th of February, when *Aston* declared his intention of going into the Gazette, rather than allow his trade creditors to be prejudiced by any proceedings on the bond. Parker pressed upon *Aston* the propriety of not making any preference. On the same day *Aston* went to Meredith, an attorney at Birmingham, and directed him to prepare a warrant of attorney to confess judgment for 6000*l.* to his brothers T. and J. Aston, and to prepare a bill of sale of his furniture at Shakerley, for securing 700*l.* to his sister, to whom he was indebted in 550*l.*, and who had ordered goods for his house, *in his name*, to an amount which, supposing them to be liable to pay for those goods, would cover the difference. The warrant of attorney was executed in the course of the day, and the bill of sale was taken by *Aston* to Shakerley, where he executed it the same evening, giving at the same time to one of his sisters a silver spoon. On the 5th of March *Aston* returned to Shakerley, and remained there till the morning of the 7th, when he left the house, telling his sisters that from thenceforth they were to be the housekeepers. On the same day *Aston* said to his partner, "My brothers will be in possession of my property either to-night or to-morrow, as a security, until some arrangement can take place." The same evening he set off for London. The *fi. fa.* at the suit of T. and J. Aston was delivered at the sheriff's office on the 7th of March, at eleven in the morning. Bishton's writ was delivered to the sheriff at Wolverhampton about two o'clock. Warrants were issued on both writs. The officer took possession under T. and J. Aston's warrant about five in the afternoon. A seizure under Bishton's warrant took place at eight in the evening. Upon the evidence it was insisted,

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that by executing the warrant of attorney *Aston* had committed an act of bankruptcy, under the provisions of 6 *Geo.* 4, cap. 10, s. 3, which enacts, that if any such trader shall procure his goods, money, or chattels to be attached, sequestered, or taken in execution, every such trader doing, suffering, procuring, executing, permitting, making, or causing to be made, any of the acts, deeds, or matters aforesaid, *with intent to defeat or delay* his creditors, shall be deemed to have thereby committed an act of bankruptcy. Secondly, that the bill of sale was a fraudulent deed, and that a third act of bankruptcy was committed by departure from the dwelling-house on the morning of 7th of March. Upon the first point it was contended, that the warrant of attorney was given voluntarily, and *Aston* himself, not his brothers, directed the issuing of the execution. Upon the second point it was contended that it was a fraudulent conveyance of some of the bankrupt's goods with intent to delay his creditors; that there was no good consideration for the deed, the antecedent debt being only 550*l.*, and the sisters being under no obligation to pay for the furniture; and that the consideration was not truly stated, not being 700*l.* in money. The learned Judge told the jury, that the giving of a warrant of attorney was not an act of bankruptcy; but he should want their opinion whether, as *T. and J. Aston* did not take the goods until after they had been seized by Bishton, *Aston* procured his goods to be taken in execution to defeat his creditors. As to the bill of sale, if *Aston* meant his sisters should pay for the furniture, it is hardly evidence of fraud. So of the statement of the consideration, the words "in money well and truly paid" being put in of course, as it is the common form. The important thing to be considered is, whether this was a voluntary deed, and executed in contemplation of bankruptcy. That it was a voluntary deed, there can be little doubt. Then you must consider whether this was done in contemplation of bankruptcy. If it was in contemplation

of bankruptcy, as it was voluntary, it would be a fraudulent deed, and consequently an act of bankruptcy. As to the departing, the question is as to his intention to defeat or delay his creditors, whether he contemplated becoming a bankrupt. Did he ever mean to return? The jury found a verdict for the defendant. A rule *nisi* to set aside this verdict, on the ground of misdirection and of its being against evidence, was obtained by *Taunton*, who cited *Pulling* v. *Tucker* (*a*).

Campbell, *Russell*, Serjt., and *Barstow*, now shewed cause. The jury were directed to find a verdict for the plaintiff, if they were satisfied that the bill of sale was executed in contemplation of bankruptcy. The jury must be now taken to have negatived each of the acts of bankruptcy set up at the trial. The simple question is, whether an act of bankruptcy was committed before five o'clock on the 7th of March, when the execution went in. The commission was sued out within two months. Taking the points raised in the order of their importance, the plaintiffs first rely upon the departure from the dwelling-house. Secondly, they rely upon the late bankrupt act, which makes the causing of goods to be taken in execution an act of bankruptcy. [*Bayley*, J. Bishton's execution was not first in the office; the brothers' writ was delivered at the office at eleven, Bishton's at two in the afternoon. Possession was taken under the brothers' writ at eight o'clock.] The words "taken in execution" are introduced for the first time in 6 *Geo.* 4, c. 16, s. 3. Did *Aston*, before five o'clock on the 7th of March, commit an act of bankruptcy? Lord *Tenterden* doubted, when the rule was moved for, whether the act applied to a warrant of attorney given for a just debt; whether, looking to the context, it was not confined to the creation of a fraudulent charge. [*Bayley*, J. "Suffering to be arrested" must be "for a debt not due;"

(*a*) 4 B. & A. 382.

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"procuring to be arrested," &c. *generally* is an act of bankruptcy.] It is not necessary to argue that point, because the goods were not taken by the brothers until three hours after they were taken by Bishton. [*Bayley*, J. As soon as the sheriff seized, he would be in possession under both writs.] There is no taking in execution until the goods are actually seized. [*Holroyd*, J. The seizure enures for the benefit of the first writ. *Littledale*, J. The seizure under the statute of James I. is an execution actually served.] Could the sheriff maintain trespass until he had entered? [*Bayley*, J. Each officer, though he has a separate warrant, acts under the sheriff, and the first seizure will operate as a seizure under the first writ.] Taking in execution, in the statute, must mean an actual, not a constructive taking. The priority of Bishton's execution is a decisive answer to the first act of bankruptcy. [*Bayley*, J. Are you aware of *Hutchinson* v. *Johnson* (*a*)?] That was in the exercise of the equitable jurisdiction of the Court. [*Bayley*, J. No. It proceeded on the ground that other parties were entitled.] For certain purposes it was an execution of the first writ; but the question here is, whether it was so under the statute. T. and J. Aston's execution was afterwards withdrawn. The sheriff must be taken to have seized under both writs; if at the same point of time, there is no priority that defeats Bishton's execution. [*Holroyd*, J. When the goods are taken into the custody of the sheriff, it must be taken to be a seizure under all the writs then delivered to him.] The bill of sale made to the sisters must be fraudulent, and in contemplation of bankruptcy, to make it an act of bankruptcy. *Pulling* v. *Tucker* is submitted to have been wrongly decided. It was there contended, that an assignment of part by way of preference was an act of

(*a*) 1 T. R. 729, in which it was held, that where two writs of *fi. fa.* against the same defendant are delivered to the sheriff on different days, *and no sale is actually made* of the defendant's goods, the first-delivered writ of execution must have the priority, even though the seizure were first made under the subsequent writ.

bankruptcy, though not made in contemplation of bankruptcy. A conveyance of the whole necessarily disqualifies the party from carrying on his trade, but a conveyance of part, in order to make it an act of bankruptcy, must be either fraudulent or in contemplation of bankruptcy. In *Pulling* v. *Tucker* indeed there was actual fraud. [*Bayley*, J. The Court, in that case, thought it not necessary to put it to the jury whether the conveyance was made in contemplation of bankruptcy.] The excess of the security to the sisters was a circumstance from which the jury might or might not have presumed fraud. A silver spoon was delivered over, and possession went along with the deed. [*Holroyd*, J. Was the bill of sale absolute, or by way of mortgage?] It was absolute. There was no evidence that the goods were of greater value than the debts which they were assigned to secure. [*Bayley*, J. You may address yourselves exclusively to the bill of sale.] Whether it was an act of bankruptcy, must be a question for the jury. If the bill of sale is fraudulent, it must be either so at common law, or under the statute of *Eliz.*, or as being in contravention of the bankrupt laws; both these points were left to the jury. As to the consideration expressed in the bill of sale, there can be no doubt but that part was actually due. As to the difference between the debt actually due and the 700*l.*, it was what the sisters would probably be called upon to pay. If not fraudulent at common law, then was it fraudulent within the bankrupt laws? [*Bayley*, J. If a trader knows his circumstances to be so bad, that by looking at his books he would see that he is insolvent, he must be considered as contemplating bankruptcy.] *Aston* had reasonable ground to hope and believe that he should be able to go on. [*Bayley*, J. In *Pulling* v. *Tucker*, the trader, at the time he executed the deed, was much pressed with writs, and was insolvent. No money was in fact paid, and *Cranch*, the creditor, knew nothing of the deed. It was urged, in that case, that it was essential that the Judge should put it to the

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jury whether the deed was executed in contemplation of bankruptcy, and the Court said No; it is sufficient if his circumstances were such as to shew that bankruptcy would be the necessary consequence. *Fidgeon* v. *Sharpe* (*a*).] The sisters might have been called upon to pay enough to make up the 700*l*. It does not appear the bankrupt knew that he, and not his sisters, was liable to pay for the furniture. The words "or whereby his creditors may be defeated or delayed" (*b*), are omitted in the new bankrupt act. [*Bayley*, J. Has it not been decided (*c*) that the words "or whereby" are synonimous with "in order?"] If the omission of these words in the late act makes any alteration, it lessens the authority of *Pulling* v. *Tucker*.

Taunton, *Whateley*, and *Holroyd*, contrà. The question was not properly left to the jury. In the way the case went to the jury, it was almost impossible that they could come to a different conclusion. The points stated to the jury were only calculated to raise a prejudice in favour of the defendant. The most honourable act which a man may have done in the course of his life may be fraudulent with respect to the bankrupt laws. The best canon of construction is to look to the statute itself. "In contemplation of bankruptcy" means that the bankrupt has in view, at the time of the doing the particular act, bankruptcy as a consequence, or words have no meaning at all. [*Bayley*, J. It may be in contemplation of bankruptcy and not fraudulent, as where it is done upon compulsion.] A man may resolve not to commit an act of bankruptcy, and then dole out all his property. [*Bayley*, J. He may be arrested.] A man may believe himself not to be a trader. The learned judge told the jury that the act must be voluntary and in contemplation of bankruptcy. It is submitted, that if the deed was voluntary, it is in the eye of the law a voluntary

(*a*) 1 Marsh. 196.
(*b*) 1 Jac. 1, c. 15, s. 2.
(*c*) In *Robertson* v. *Liddell*, 9 East, 187, 3 Smith 347, it was so held.

deed with intent to delay or defeat creditors. [*Bayley*, J. A voluntary deed means a deed without consideration: this deed would be valid if there were no bankruptcy.] If a party knows he is insolvent, and makes a conveyance whereby a particular creditor is to have 20*s.* in the pound, such a conveyance must be with an intent to delay and defeat. In *Fowler* v. *Padget* (*a*), the mere fact of delay was held not to be sufficient without the intent to delay. [*Bayley*, J. The Court considered it the same as if the words of the statute had been "with intent *thereby* to delay?"] In *Pulling* v. *Tucker*, Lord *Tenterden* says, that in *Morgan* v. *Horseman* (*b*), *Mansfield*, C. J. lays no stress on the circumstance of its being expressly stated in that case that the deed was executed in contemplation of bankruptcy; and *Best*, J. says, that the statute (*c*) does not require that the conveyance should be made in contemplation of bankruptcy. [*Littledale*, J. "In contemplation of bankruptcy" means the same thing as "with intent to defeat or delay."] If this case had been left to the jury, in the same manner as that of *Pulling* v. *Tucker* was left by *Wood*, B., the result would in all probability have been different. If a trader having 1000*l.* owes 10,000*l.*, and makes a conveyance of 600*l.*, the other creditors are thereby defeated, and the conveyance is fraudulent and void. In *Atkyns* v. *Barwick* (*d*) the point arose, but the case was litigated on other grounds. Unless the words "voluntary" and "in contemplation of bankruptcy" are convertible terms, it is submitted that the learned Judge's direction to the jury cannot be supported. Supposing a trader, for the purpose of defeating an execution, assigned over all his seizable property, it would be an act of bankruptcy, *Newton* v. *Chant-*

(*a*) 7 T. R. 509.

(*b*) 3 Taunt. 241.

(*c*) 1 Jac. 1, c. 15, s. 2, which was then in force.

(*d*) 1 Str. 165. And see *Harman* v. *Fisher*, Cowp. 117, Lofft, 472, *S. C.* where Lord *Mansfield* said, that the judgments in this case (*Atkyns* v. *Barwick*) were right, but the reasons were wrong. And see the cases collected in Mr. Nolan's note, 1 Str. 167.

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ler (a). [*Bayley*, J. The act must be fraudulent as well as with intent to delay. How do you shew this deed to be fraudulent?] It is a confusion of terms to say that "in contemplation of bankruptcy" and "with intent to defeat or delay," are convertible terms. [*Bayley*, J. May not contemplation of bankruptcy mean liability to bankruptcy?] The jury were told that the fraud ought to be made out by clear evidence in so penal a case. But in *Worsley* v. *Demattos* (b), fraud, with reference to the bankrupt acts, was considered as a question of law. The only question for the jury was, whether the deed was voluntary. The deed was fraudulent if it was voluntary, and had the effect of giving a preference to one creditor, to the delay of others. The learned Judge should not have put to the jury what they evidently did not understand, and were not likely to understand. From the manner in which it was put, they would think that it was necessary that the act should have been done with the intention of committing an act of bankruptcy. Where a trader conveys all his property, it is immaterial whether the act is done in contemplation of bankruptcy or not. Now that proposition rests upon the same words of the statute which apply here. It was done voluntarily, to give a preference to his sisters, under circumstances in which he could not go on. [*Bayley*, J. The learned Judge was not requested to explain to the jury what was meant by "in contemplation of bankruptcy."]

BAYLEY, J.—I am of opinion that there ought to be a new trial, considering the circumstances prior to the 8th of February, and the peculiar occurrences of that day, in order to ascertain whether the bill of sale did or did not constitute an act of bankruptcy. But it must be on payment of costs. There was no misdirection as applied to this particular case. To make the bill of sale an act of

(a) 7 East, 137, 3 Smith, 137. *Kenyon*, 218. And see *Wilson* v. *Day*, 2 Burr. 827.

(b) 1 Burr. 476, *S. C.* 2 Lord

bankruptcy, it must be fraudulent and with intent to delay creditors. They will be delayed if the party become a bankrupt, but not otherwise. There certainly were circumstances of fraud. The act moved from the bankrupt, not by any pressure upon him. A bill of sale voluntarily given is not of necessity fraudulent. If the party is solvent, and able to pay every body, there would be no fraud. Here there was a vast deal of evidence to shew fraud, and that *Aston* contemplated bankruptcy. By contemplation of bankruptcy is not meant the expectation of a commission issuing, but that the party is in such a state that bankruptcy is likely to follow, or that it is one of the probable results. If counsel thought a further statement to the jury necessary, and had suggested it to the judge, he would have given the explanation desired. I do not consider that our decision is inconsistent with the case of *Pulling* v. *Tucker*. It is not necessary in every case to put it to the jury whether the act was done in contemplation of bankruptcy. There were other circumstances in that case to shew that the deed was fraudulent. The rule must be made absolute, on payment of costs of the last trial, the costs of the first trial, and the costs when the cause was made a remanet to abide the event.

Taunton. The costs occasioned by the notice to dispute will of course be set off.

Rule absolute, on payment of costs.

Upon the third trial at the last Staffordshire Assizes, before *Park*, J. (*a*), a verdict was found for the plaintiffs. The writ of *fi. fa.* issued by Bishton was not produced; the warrant only, under the defendant's seal of office, was given in evidence.

Campbell now moved for a new trial. The plaintiffs have at last obtained a verdict, which is questioned only

(*a*) Counsel for the plaintiff, *Taunton*, *Whateley*, and *Holroyd*; for the defendant, *Campbell* and *Russell*, Serjt.

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upon one short point, namely, whether the evidence was sufficient to fix the sheriff. On the two former trials, the writ of *fi. fa.*, as well as the warrant, was given in evidence. On this occasion the warrant only was produced. [*Bayley*, J. Suppose the under-sheriff issues a warrant, though no writ has issued, is not the sheriff bound?] The under-sheriff has only a limited authority. If he grants a warrant, where there is no writ, he exceeds the authority which he has received from the sheriff, and the latter is not liable. He is liable for any thing done under colour of the writ, but there is no authority in the books to shew that he is liable where no writ has been issued. [Lord *Tenterden*, C. J. It has frequently happened that a plaintiff has kept back the writ, in order to force the sheriff to produce it as part of his case, and thereby give the plaintiff the reply; and sometimes the plaintiff, in order to avoid calling the bailiff, has produced the writ only.] In *Sunderson* v. *Baker* (*a*) it was left to the jury whether the sheriff had recognized the acts of the bailiff. [*Bayley*, J. You do not prove that there was no writ. The question is, who is to prove the writ?] What authority does the sheriff give to the under-sheriff when he intrusts him with his seal?

Lord TENTERDEN, C. J.—The question is, not whether the sheriff is liable where no writ had been issued, but what shall be presumptive evidence to charge the sheriff. I am of opinion that in this case there was sufficient evidence to charge the sheriff.

Rule refused.

(*a*) 3 Wils. 309.

DOE, on the Demise of JEFF and another, *v.* ROBINSON and another(*a*).

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EJECTMENT on a demise laid 16th May, 1827, of lands in Northallerton, in the county of York. At the trial before *Bayley*, J. at the Yorkshire summer assizes, 1827,(*b*) a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case:—

A., seised to him and his heirs, for the life of *B.*, devises to *C.* without using words of inheritance: Held, that on the death of *C.* living *B.* the heir of *A.* takes as special occupant.

By lease dated 24th November, 1783, and made between the bishop of Durham, of the one part, and Thomas Dowson, of the other part, the said bishop did demise, &c. unto the said Thomas Dowson, his heirs and assigns, *all that half ox-gang* of new land, lying, &c., and then divided into eight closes, to have and to hold the same unto the said Thomas Dowson, his heirs and assigns, from the making of the said lease for and during the natural lives of the said Thomas Dowson, John Dowson, and Thomas Robinson, and the life of the longest liver of them, at the yearly rent of, &c. payable, &c. By his will, dated 21st November, 1808, and duly made, executed and attested, to pass real estates, Thomas Dowson being then in possession under the said lease, devised as follows:—"I give my daughter, Elizabeth Robinson, my two houses situate, &c. and my two closes lying, &c. (the said two closes being the lands in question, and part of the eight closes demised to Thomas Dowson by the bishop of Durham.") Then follow a variety of other devises:—"And all the rest of my estate, both real and personal, I give to my son John Dowson, he paying my daughter Ann Dowson 40*l.* per annum out of the rents arising from the Turks Banks, and also all my just debts and funeral expenses, *and also for leasing the half ox-gang after my decease;* and lastly, I make my said son, John Dowson,

(*a*) This case was argued before the three Judges in the Bail Court at the sittings after last Hilary term, but judgment was not given till the sittings after Easter, when the cases which follow this were heard.

(*b*) Counsel for plaintiff, *John Williams* & *Alexander;* for defendants, *F. Pollock* and *C. Cresswell.*

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sole executor of this my last will and testament." Thomas Dowson died 14th March, 1814, without having altered or revoked his said will; and upon his death Elizabeth Robinson entered into possession and received the rents until her death on the 1st February, 1826, at which period, John Dowson and Thomas Robinson, two of the *cetteux que vies* mentioned in the said lease were still living. After the death of Elizabeth Robinson, the defendants, her only children, entered into possession of the premises in question. John Dowson, the heir at law, as well as residuary devisee (*a*) and executor of Thomas Dowson, died on 20th February, 1827, having previously, by his will duly made, &c. and bearing date the 20th September, 1822, given and devised the lands in question, and all other his messuages, &c. which he was seised of or entitled unto, in reversion, remainder, or expectancy, situate, &c., and all his the said testator's personal estate, unto the lessors of the plaintiff, their heirs, executors, &c. according to the respective natures and tenures thereof upon the several trusts therein mentioned. And the said testator appointed them executors in trust of his said will. The said Thomas Robinson, one of the *cetteux que vies* named in the said lease of the 24th November, 1783, is still living. The question for the opinion of the Court is, what interest in the said two closes passed to Elizabeth Robinson under the will of Thomas Dowson? (*b*)

(*a*) Where a person seised of lands *in fee simple* devises those lands *in fee simple* to his heir at law, the devise is inoperative. The heir must take by his elder title, both because such elder title as heir is in general more beneficial to the party himself, and because the law will not allow the heir to withdraw the assets by descent from the grasp of the specialty creditors of the ancestor, by electing to hold those assets in a different character. Where, however, an estate is limited to the heir by the will, different in quality from that which he would have acquired by descent, the devise will take effect. See the cases collected Com. Dig. Devise K. at the end.

(*b*) The points for argument, as stated in the margins of the paper books, were these:

"For the lessors of the plaintiff it will be contended, that under the will of *Thomas Dowson*, *Elizabeth Robinson* took only an estate

Alexander, for the plaintiff. This was a freehold estate in Thomas Dowson. By the will no interest passed, except for the life of the devisee. Subject to the life estate of the devisee, it therefore went to the heir of the devisor. For the first point it would be sufficient to refer to *Atkinson* v. *Baker* (*a*), with which agree *Norton* v. *Frecker* (*b*), *Oldham* v. *Pickering* (*c*), *Dowdeswell* v. *Dowdeswell* (*d*), *Watkins* v. *Lea* (*e*). In *Holden* v. *Smallbrooke* (*f*), *Vaughan*, C. J. was of opinion that the heir took by descent rather than as special occupant. It will be urged on the other side, that an estate *pur auter vie*, though a freehold, may go to the executor as special occupant, and that where an executor may take, there is no necessity for expressing limitation, and that, consequently, in this case the personal representatives of E. Robinson became entitled on her death. The authorities relied on will probably be Mr. Preston's Treatise on Abstracts (*g*), *Williams* v. *Jekyll* (*h*), *Ripley* v. *Waterworth* (*i*), *Duke of Devon* v. *Atkyns* (*k*),

for life, and therefore, that upon her death *John Dowson*, and subsequently his devisees in trust, (the lessors of the plaintiff,) became entitled to the lands in dispute."

"For the defendants it will be contended, that under the will of *Thomas Dowson*, *Elizabeth Robinson* took the whole estate which, at the time of his death, he had in the premises in question, and consequently that the lessors of the plaintiff have not any title to the same."

(*a*) 4 T. R. 229.

(*b*) 1 Atk. 524, where it was held, that a lease to *A.*, and his heirs, during three lives, being settled by *D.* to the use of *A.* for life, and to the first and every other son in tail male might vest in the remaindermen as special occupants.

(*c*) Carthew, 376; where it was said by the Court, that notwithstanding the statute of frauds, such an estate still remains a freehold, and the administrator is tenant of such freehold, against whom the præcipe must be brought, if a common recovery should be had against him of the lands.

(*d*) 2 Vern. 226, cited; where it was held, by *Hale*, C. J., that an estate *pur auter vie*, of lands in Borough English should descend, and go to the heir in Borough English.

(*e*) 6 Ves. jun. 633, where Lord *Eldon* says (p. 642), "It is stated, and I think so, that a devise of all freehold lands will include leases for lives."

(*f*) Vaughan, 201.

(*g*) 1 Prest. Abstr. 442.

(*h*) 2 Vez. sen. 681.

(*i*) 7 Ves. jun. 425.

(*k*) 2 P.Wms. 381. *Et vide post*, 239, note (*f*).

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Same v. *Kinton* (*a*), *Westfaling* v. *Westfaling* (*b*), and 2 Rolle's Abridgment, 151, Occupant, G. pl. 2.; but upon examination these authorities will be found either inapplicable or at variance with later decisions. Mr. Preston founds his opinion, that estates *pur auter vie* will pass by devise without words of limitation, on *Williams* v. *Jekyll;* but there the lease was not originally limited to heirs, but to executors, administrators and assigns, and Lord *Hardwicke* points out that difference, and expressly excepts the case of a descendible freehold. That case also was discussed and determined very much on a ground of intention, which does not arise here. In *Ripley* v. *Waterworth*, the marginal note (*c*) states, that an executor may be a special occupant; but that note is not warranted by the text. Lord *Eldon* does not decide the point; he merely expresses doubts upon the subject, founded principally on the dictum of Lord *Hardwicke* in *Westfaling* v. *Westfaling*, in which Lord *Hardwicke* says "In this case the executor is as a special occupant for that purpose." Lord *Hardwicke* refers to 2 Roll. Abr. 151 (*d*). "If a man lease to another, and his executors, land for the life of J. S., and *cestui que vie* (*e*) dies, the executor shall be a special occupant;" but Rolle's authority is Dyer, 328, b. (*f*) in which the point does not

(*a*) 2 Vern. 719.

(*b*) 3 Atk. 466.

(*c*) 7 Ves. jun. 440.

(*d*) Occupant G. pl. 2; and in 16 Vin. Abr. 73.

(*e*) This is evidently a mistake, as upon the death of *cestui que vie*, the estate is of course at an end. No such inconsistency appears in Dyer, where indeed the case is totally different from this inaccurate abstract; but the particular mistake in question, though it would seem to be sufficiently obvious, is not noticed by Lord *Hardwicke* when vouching, or by Viner when translating Rolle.

(*f*) Plac. 10, Anon. The case is reported in Dyer, thus:—"Tenant for term *d'auter vie*, makes lease, by indenture, for term of years, reserving rent to himself and his executors and assigns. The lessor dies during the term, the lessee continues in the occupation, and the *cestui qui vie* is still living. *Quære*, if the termor shall be adjudged occupant, or tenant by sufferance, paying the rent to the executors of his lessor. And if he will not do this, what remedy in law for the executors? And if the freehold shall be adjudged in him who has the reversion in fee, &c.?

arise (*a*); and in the very next placitum it is said (*b*), "if a man grants a rent to another, his executors and assigns, for the life of J. S., and afterwards the grantee dies, making an executor, but no assignee, the executor shall not be a special occupant, because it is a freehold, which cannot descend to an executor." The *Duke of Devon* v. *Kinton* (*c*) was the case of a trust estate; so *Duke of Devon* v. *Atkyns*. There are many authorities shewing that an executor cannot be a special occupant. Besides those in Rolle and Vaughan, Salter's case (*d*), 2 Bacon's Abr. 566 (*e*), Com. Dig. Estates, F. 1, 2 Bla. Comm. 259, *St. John's College* v. *Fleming* (*f*), and the opinion of Lord *Redesdale*, Ch. in *Campbell* v. *Sandys* (*g*), may be cited. [*Bayley*, J. How does the question, whether an executor can be a special occupant, arise? What title have you unless the heir can be special occupant? If upon a lease to *A.*, his executors, administrators and assigns, the

But *per Whiddon*, the case is better for the lessee for years, than above. For the case *in principio* (the original lease to grantee *pur auter vie, ut videtur*) was made to the first tenant *habendum sibi et executoribus et assignatis suis* for term *d'auter vie;* and livery of seisin was made accordingly, *ut oportet*."

(*a*) And see *S. C.* 3 Leon. 35, *per nomen* Lord Winsor's case.

(*b*) *Buller* v. *Cheverton*, Trinity, 3 Car. I., 2 Roll. Abr. 151, 152.

(*c*) *Duke of Devon* v. *Kinton*, and *Duke of Devon* v. *Atkyns*, were bills filed by the plaintiff against the successive devisees of his insolvent steward, who had purchased a freehold lease to him and his heirs, and upon the marriage of his daughter had assigned that lease to trustees, to the use of the daughter and son-in-law for their lives, remainder to his own executors, administrators, and assigns.

(*d*) Lord *Hale*'s MSS., Hargrave Co. Litt. 41 b, n. 240; *S. C.* Cro. Eliz. 901, *per nomen Salter* v. *Butler;* Noy, 46; Yelv. 9; Sir F. Moore, 664; 1 Tho. Co. Litt. 626; where it was held, that rent granted to one, his executors and administrators, *pur auter vie*, did not go to the administrator of the grantee as special occupant, but determined by the death of the grantee, unless there had been an assignment. As to which, see also *post*, 266, 267.

(*e*) 2 *Bac. Abr.* Estate for Life in Occupancy, B. 3, (sixth and seventh editions, page 566.)

(*f*) 2 Vern. 320. In that case a lease to J. S., *habendum*, to J. S. his executors, administrators and assigns, for three lives, was held to be a descendible estate, and to go to the heir, and not to the executor.

(*g*) 1 Sch. & Lef. 289. And see Shepp. Touchstone, 5th ed. 104; Toll. Ex. 140.

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executor cannot be an occupant, can the heir be a special occupant? Is not the simple question, whether the heir is to take the estate if not disposed of, and how much the testator has given away?] If executors cannot be special occupants, then, upon the death of *Elizabeth Robinson*, without having in her life-time disposed of the property, no interest could devolve upon her personal representatives. Secondly, it is an established principle of law, that a grant of freehold lands, without words of limitation, vests no more than a life estate in the grantee (*a*). In cases of devise, the intention of the testator, as apparent on the face of the will, is sometimes allowed to supply such omission, and to pass a larger estate than the expressions used would otherwise suffice to pass. Thus the words "estate," "property," "effects," have been considered as passing a fee, when without them only a life interest would have been taken (*b*). But the devise in question contains no such expression, nor will any other clause in the will assist such a construction. On the contrary, the intention of the testator is evidently to give a life interest only to his daughter, with remainder to his son, because he afterwards charges his son with the expense of "leasing" the property in question after his decease. Then as a life interest only passed to the devisee, the estate, upon her death, reverted to the heir at law of the testator, *Atkinson* v. *Baker* (*c*), and the present lessors of the plaintiff, the devisees of that heir at law, are entitled to it.

(*a*) Co. Litt. 9 b, 42 a.

(*b*) See *Frogmorton* v. *Holyday*, 3 Burr. 1618, 1 W. Bla. 535; *Roe* v. *Harvey*, 5 Burr. 2638; *Jackson* v. *Hogan*, 3 Bro. P. C. 389, Cowp. 299, *S. C.*; *Holdfast* v. *Marten*, 1 T. R. 411; *Fletcher* v. *Smiton*, 2 T. R. 656, 2 Chitt. 558, *S.C.*; *Roe* v. *Wright*, 7 East, 259, 3 Smith, 229, *S. C.*; *Doe* v. *Roper*, 11 East, 518; *Roe* v. *Pattison*, 16 East, 221; *Randall* v. *Tuchin*, 6 Taunt. 410, 2 Marsh. 113; *Paris* v. *Miller*, 5 M. & S. 408; 2 Wms Saund. 388 d.

(*c*) 4 T. R. 229, where it is said, that "if an estate *pur auter vie* be limited to a man, his heirs, executors, administrators, and assigns, and be not devised, it descends to the heir as special occupant."

C. Cresswell, contrà. Lord Chief Baron *Gilbert*, in his treatise on Tenures, explains how the term "heir" came to be introduced into conveyances in this country. He says, (*a*) Feuds are hereditary or for life. In hereditary feuds the word "heirs" is required to distinguish it from the original feud that was for life only. And Mr. *Watkins*, in his note on that passage, says, "This," as *Blackstone* remarks, "is plainly a relic of the feudal strictness, by which it was required that the forms of donation should be punctually pursued; or that, as *Craig* expresses it, in the words of *Baldus*, 'Donationes sint stricti juris, ne quis plus donâsse præsumatur quam in donatione expresserit.' And therefore, as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his *heirs*." The term was therefore introduced for the purpose of altering the quantity of the estate. If it be shewn that the word *heir* does not increase the quantity of the estate, the case is advanced one step in favour of the defendants. Then, first, an estate for life, in such a case, may be created without words of limitation; for "if one grant lands or tenements, reversions, remainders, rents, advowsons, commons, or the like, and express or limit no estate, the lessee or grantee (due ceremonies requisite by law being performed) hath an estate for life." Co. Litt. 42, a. And that estate for life cannot be altered or enlarged by the introduction into the grant or lease of the word *heirs;* for "if a lease for years be made to a bishop and his successors, yet his executors or administrators shall have it in *auter droit*, for regularly no chattel can go in succession, in case of a sole corporation, no more than if a lease be made to a man *and his heirs*, it can go to his heirs." Co. Litt. 46, b. So here, the introduction of the word *heirs* in this lease does not vary the estate which

(*a*) Gilb. Ten. 3.

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passed under the lease to the testator *Dowson*. An estate to *A.* for the life of *B.*, is as large as an estate to *A. and his heirs*, for the life of *B.*; and the testator *Dowson* would have had the same estate, and no more, if the lease had not contained the word *heirs*. If an estate for life may be created without words of limitation, upon what principle can it be contended that it cannot be devised also without words of limitation? If *Dowson*, the testator, in the devise to his daughter, had used words of limitation, had used the word *heirs*, that would not have enlarged the quantity of the estate devised; if it could, the testator would be devising a larger estate than that which he had to devise. The only question is, whether the words of this devise are large enough to pass an estate *pur auter vie*. It is clear that they are large enough to pass an estate for the life of the devisor, the original grantee; and if so, it follows that they are large enough to pass an estate for the life of another, which is the smaller estate of the two. Secondly, the *quality* of the estate cannot affect the question. An estate *pur auter vie* is not more an estate of inheritance, than if it had been given for the life of the grantee. In *Rennel* v. *The Bishop of Lincoln* (*a*), it was considered that the word *heirs* would not enlarge the estate. The same quantity of estate passes by the one grant as by the other. [*Littledale*, J. The mention of heirs only directs who shall take as occupants.] If the word *heirs* would not affect the quantity of the estate, the quality of this estate cannot require the introduction of the word. Nothing requires words of inheritance, but an estate of inheritance. The only question is, whether the words are large enough to carry the estate. A devise to *A.* is sufficiently large to carry the estate for the life of *A.* Then an estate for the life of the grantee is always greater than an estate *pur auter vie*. The words here used operate to pass all the devisor's estate. There is nothing in the quality of the estate requiring the use of words of inheritance. There

(*a*) 7 B. & C. 113.

is ample authority to shew that this is not an estate of inheritance or even a descendible freehold. The latter term has been used, in common parlance, to designate this species of estate, without attending to the accuracy of the term. In *Doe* v. *Luxton* (*a*) it is said, that "if a freehold lease for lives be limited to *A.* and the heirs of his body, with remainder over, *A.* may dispose of the whole, and defeat the remainders, by any conveyance during his life-time: or, *semble*, by his will alone:" and Lord *Kenyon* there expressed his disapprobation of the phrase "descendible freehold." In *Ripley* v. *Waterworth* (*b*), Lord *Eldon* expressed a similar opinion. In *Littleton*, s. 387, it is said, "And note, that in such descents which take away entries, it behoveth that a man die seised in his demesne as of fee, or in his demesne as of fee-tail. For a dying seised for term of life, or for term of another man's life, doth never take away an entry." Upon which Lord *Coke* says (*c*), "If a disseisor make a lease to a man and to his heirs during the life of *J. S.*, and the lessee dieth, living *J. S.*, this shall not take away the entry of the disseisee, because he that died seised had but a freehold only, and heirs in that case were added to prevent the occupant, for the heir in that case shall not have his age, as it was adjudged in *Lamb*'s case." (*d*) Then, thirdly, a special occupant may be ousted without words applying specifically to him, *Williams* v. *Jekyll* (*e*). [*Bayley*, J. In that case the testatrix used the words "all my right, title, and estate."] But those words applied to a different subject-matter. Lord *Hardwicke* there certainly seems to have thought, that a lease for lives to one, his executors and administrators, would make the executor or administrator a special occupant; and if an executor or administrator must take as special occupant, and the heir can only take so, a devise of an estate *pur auter vie* to one and his heirs, and to one

(*a*) 6 T. R. 289.
(*b*) 7 Ves. 425, 437.
(*c*) Co. Litt. 239 a.
(*d*) E. 16 Eliz. C. P.
(*e*) 2 Vez. sen. 681.

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and his executors, is the same thing. An estate *pur auter vie* is not assets by descent. It does not entitle the widow to dower. There can be no descent cast to take away a right of entry. Litt. 387; Co. Litt. 239, a. (*a*) In *Doe* v. *Luxton* (*b*), Lord *Kenyon* says such estates have been improperly called descendible freeholds. [*Littledale*, J. If an estate *pur auter vie* be limited to a man and the heirs of his body, would a fine be necessary?] The first taker may bar the estate tail (*c*), otherwise it would tend to a perpetuity; it would be *quasi* an estate tail. *Love* v. *Burron* (*d*). [*Holroyd*, J. There the issue would take in succession as special occupants. *Littledale*, J. You admit that if the devise had been to *Elizabeth Robinson* for life, she would not have taken the whole. *Bayley*, J. What are the forms of proceedings in real actions? You would probably find some in Townsend (*e*).] There is a case directly in

(*a*) 2 Tho. Co. Litt. 26.

(*b*) 6 T. R. 289. In that case Lord *Kenyon* said, p. 191, that it still remained a freehold interest for many purposes, such as giving a qualification to vote for members of parliament, to kill game, and some others, and that a will to dispose of it must be attested by three witnesses under the statute of frauds.

(*c*) In *Duke of Grafton* v. *Hanmer*, 3 P. Wms. 266, it was held, that a lease for three lives devised in tail might be barred by fine levied by first tenant in tail. So it may be barred by *deed* without fine or recovery. Estates *pur auter vie* cannot be the subject of a proper entail. The heirs of the body take as *special occupants*. Lord *Kenyon* thought these *quasi* entails might be barred by *will;* and when it is considered that the special occupant is only designed to fill up the possession, if the owner of the estate *pur auter vie* do not otherwise appoint, there is, perhaps, more reason for this opinion than might at first appear. *Vide tamen Grey* v. *Mannock*, 2 Eden, 341, n.; *Campbell* v. *Sandys*, 1 Scho. & Lefr. 294. That such entails are barrable, or rather that such destinations are revocable, by deed, see *Saltern* v. *Saltern*, 2 Atk. 374; *Doe* v. *Luxton*, 6 T. R. 289; *Blake* v. *Blake*, 3 P. Wms. 10, n.; *Moody* v. *Walters*, 16 Ves. jun. 319; *Blake* v. *Luxton*, Cooper, 178.; *Mogg* v. *Mogg*, 1 Mer. 654.

(*d*) Ibid. 262, where it was held, that a lease for three lives might be limited to *A.* in tail, remainder to *B.*

(*e*) Townsend refers only to two cases, 2 Bulst. 13, (*Chamberlain* v. *Ewer*, 2 Bulst. 11,) which was a case where the tenant at will of tenant *pur auter vie*'s lessee for years, was held to be general occupant, *nolens volens*, upon the death

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point, and still stronger than the present, *Campbell* v. *Sandys*. There, by articles relating to leases *pur auter vie*, and for years, and to money, it was agreed that the leases for lives and for years should be conveyed to trustees, in trust, (after successive life estates to *D. C.* and *J. C.*) " after the decease of *J. C.*, to the *issue* of *J.* and *A. C.*, in such shares and proportions as *J.* should appoint, and for want of such appointment, to go to such children equally, share and share alike; and for default of such *issue*, to the heirs, executors, and administrators of *J.* during the leases: the money or the lands agreed to be purchased therewith: to go to the issue of *J.* and *A. C.*, in such shares and proportions, &c.; and for want of such appointment, to be equally divided among such children, share and share alike; and if no children of the marriage, or all should die before 21," then a power was reserved to dispose of the money. And it was held, that *issue* was to be construed *children*, and that the issue of *J.* and *A. C.* took the absolute interest

of tenant *pur auter vie*, even against his own disclaimer; and Co. Ent. 221, (*Styleman* v. *Sympson*,) where in a writ of entry it is stated, by way of inducement to a traverse in a replication, that Walter Styleman, tenant in tail in remainder, granted by deed all his estate to Richard Ratclyffe *simply*, (*per scriptum suum concessit totum statum et interesse sua de et in prædicto remanere suo prædictæ secundæ medietatis tenementorum prædictorum cum pertinentiis, prædicto Richardo Ratclyffe,*) that tenant for life attorned, and afterwards died; that Ratclyffe entered, and died in the life-time of Styleman; that Margaret, then the wife of John Ackland, *ut una consanguinearum et hæredum prædicti Richardi Ratclyffe in prædictam secundam medietatem tenementorum prædictorum cum pertinentiis,* tanquam occupans inde, *intravit. Per quod prædicti Johannes et Margareta postea fuerunt inde seisiti in dominico suo, ut de libero tenemento, in jure ejusdem Margaretæ, pro termino vitæ prædicti Walteri,* ut occupantes inde, *pro eodem termino tantùm.* From this mode of pleading it may be inferred that it was considered to be unnecessary to use words of limitation even in an *assignment* of an estate *pur auter vie, scil.* for the life of the grantor, tenant in tail in remainder; for " *status et interesse*," though sufficient in a will, would not operate as words of limitation in a deed; and also, as it would seem, that where land is granted to a man and his heirs *pur auter vie*, and the grantee dies during the term, leaving several coheirs, the first of the coheirs who enters becomes *solely* seised. *Tamen quære.*

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in the chattel property, and a *quasi* fee in the freehold property. A deed is more strictly construed than a will.

Alexander, in reply. The term "descendible freehold," though mentioned with disapprobation by Lord *Kenyon*, in *Doe* v. *Luxton* (*a*), has nevertheless been adopted by several high judicial authorities; for it will be found to be used by *Vaughan*, C. J. in *Holden* v. *Smallbrooke* (*b*); by Lord *Coke*, in *Seymour's Case* (*c*); by Lord *Hardwicke*, in *Williams* v. *Jekyll* (*d*); by Lord *Northington*, in *Grey* v. *Mannock* (*e*); and by Lord *Talbot*, in *Low* v. *Burron* (*f*). The argument urged on the other side, with regard to the effect of the word *heir* upon the quality and quantity of an estate, would be more applicable to the case of the creation, than of the transfer, of an estate *pur auter vie;* because it is at the period of its creation that the estate receives its character. Could not the testator in this case, if he pleased, have given, by express words, an estate for life to his daughter, and the remainder, after her death, to his son? And what more has he in effect given to his daughter? The devise here should be read, according to the received rule in such cases, as if the words, "for life," had been introduced; and that would clearly have been good, as making her tenant for life only. The argument that she might during her lifetime have disposed of the whole estate, is answered by the admitted fact that she did not do so. *Campbell* v. *Sandys* was entirely a case of intention, and for that reason it is by no means a conclusive authority, where the question of intention does not arise. The whole of the argument respecting executors being capable of special occupancy, has proceeded upon the assumption that they were named in the grant, in which case that *designatio personæ* might have been urged as investing them with that

(*a*) 6 T. R. 289.
(*b*) Vaughan, 187.
(*c*) 10 Co. Rep. 98, a.
(*d*) 2 Ves. sen. 681.
(*e*) 6 T. R. 292, cited; *S. C.* 2 Eden, 339.
(*f*) 3 P. Wms. 262.

capability. But it must be remembered that in the present devise they are not named, and must, therefore, take, if at all, in their representative characters. But how can an executor take a freehold? It must, for that purpose, remain in abeyance between the death of the testator and the acceptance of the executorship; and the law will not allow an abeyance (*a*). It is true that the inconvenience which anciently attended such a state of things, need not in modern times be apprehended; but this case must be determined on the principles that then regulated the course of real property. The statute of frauds does not apply to this case, because this is not a question of assets, nor is there any want of a special occupant in the original grant, the heir being expressly named. This case is distinguishable from Edward Seymour's case (*b*), *Holden* v. *Smallbrooke* (*c*), *Low* v. *Burron* (*d*), and 2 Bla. Comm. 259. [*Bayley*, J. When Elizabeth Robinson died, who took?] *Cresswell.* Her executor, by force of the will, and afterwards as general occupant. [*Bayley*, J. Then the testator gave E. Robinson only an estate for life.]

Cur. adv. vult.

BAYLEY, J.—In this devise there are clearly no words sufficient to pass the whole of the testator's interest in the premises; no words indicative of an intention so to do; no words of limitation. If, therefore, the testator's interest had been an estate of fee simple, unquestionably only a life estate would have passed by the devise; and then the question is, whether there is any difference in that respect between an estate of fee simple and a freehold estate *pur auter vie.* If Thomas Dowson had made no alienation of the estate in his life-time, it would at common law have

(*a*) In the ordinary case of a general occupancy there would be an interval during which the freehold would be in abeyance, unless the occupant happened to be in possession at the time of the death of tenant *pur auter vie.*

(*b*) 10 Co. Rep. 98.

(*c*) Vaughan, 187, 201.

(*d*) 3 P. Wms. 262.

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vested in his heir, as special occupant. If he had aliened without using words of inheritance (*a*), then, upon the death of the alienee, the alienation would be determined, and the estate would revert to the alienor or his heir. By the statute of frauds (*b*), sect. 12, it is enacted, "That any estate *pur auter vie* shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses; and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands." Under this statute, tenant *pur auter vie* may devise to several persons in succession. If, however, he devises for a less period than that during which the term happens to continue, the estate must either belong to the representatives of the devisor or the devisee, or be open to a general occupant. Now there is no case in which it has been decided upon that statute what is eventually to become of an estate *pur auter vie*, where it has been partially devised. It appears to me, that it belongs to the representative of the devisee. The statute of frauds directs, that any estate *pur auter vie* shall be devisable. But where there is a devise which may or must leave a chasm before the estate determines, the residue is not devised. This brings it within the next provision of the statute, "If no such devise thereof be made;" which provision ought to attach upon the portion of the estate not devised, in order that that portion may be chargeable as assets in the hands either of the heir or of the executor, thereby giving effect to the object of the act. As "the executors or administrators of the party that had the estate thereof, by virtue of the grant," must mean the

(*a*) *Vide ante*, 259, n. (*b*) 29 Car. II. cap. 3.

personal representative of the devisor; so when the statute makes the estate chargeable in the hands of *the heir*, such heir must be the heir of the devisor. This view of the provision of the statute of frauds is supported by 14 *Geo.* 2, c. 20, s. 9. The former statute had made no provision as to the residue, where the estate was made personal assets. By 14 *Geo.* 2, c. 20, s. 9, after reciting that doubts had arisen upon the former statute, where no devise had been made of such estates, to whom the surplus of such estates, after the debts of such deceased owners thereof were fully satisfied, should belong, enacts, "that such estates *pur auter vie*, in case there be no special occupant thereof, of which no devise has ever been made, according to the said act for prevention of frauds and perjuries, or so much thereof *as shall not have been so devised*, shall go to be applied and distributed in the same manner as the personal estate of the testator or intestate." The 14 *Geo.* 2, therefore contemplates that so much of the estate as is not the subject of a special occupancy, and has not been devised will vest in the executor. We think the judgment must be given for the plaintiff, as the estate devised is an estate for the life of E. Robinson only. There being no devise of the residue (*a*), it belongs not to the representatives of E. Robinson, but to the heir of Thomas Dowson as special occupant.

Postea to the plaintiff (*b*).

(*a*) Except the nugatory devise to the heir, *suprà*, 249.

(*b*) In Sir W. D. Evans's *Collection of Statutes with notes*, (second edit. vol. i. p. 244, note 30,) the learned editor says, "I have seen opposite opinions of Mr. *Fearne* and Lord *Kenyon*, as to the case of premises held under a lease for lives to the lessee, his *heirs* and assigns, *devised by him without words of limitation*, and the right to which was disputed *between the heir and personal representative of the devisee*. The opinion of Lord *Kenyon* was, that the personal representative was entitled; which seems evidently correct, as there seems no *designatio personæ* of the heir of the devisee; wherefore the case is that of there being no special occupant, so that by the statute of frauds the estate devolves on the executors." Neither of these three learned persons appears to have contemplated the existence

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of a right in any other party than the heir or personal representative *of the devisee*, to any portion of the estate. The bequest of a term of years to *A.* for life, vests the whole estate in him; though if it be given over on his decease, the gift over is good as an executory bequest, capable of divesting the residue of the term on the contingency of the devisee for life dying within the term. *Matthew Manning*'s case, 8 Co. Rep. 94 b.; *Lampett*'s case, 10 Co. Rep. 46. In the case of the devise of an estate *pur auter vie*, unless a particular estate is carved out, it would seem that nothing was left undisposed of; and the difficulty of carving an estate for a man's own life, out of an estate for the life of another person, appears to be as great as that of carving an estate for life out of an estate for years. The statute 14 *Geo.* 2, speaks of "so much as shall not have been so devised," and there may certainly be a partial devise of an estate *pur auter vie*. Thus, if the devise in question could be read as a devise for the joint lives of the devisee and the survivor of *John Dowson* and *Thomas Robinson*, (the then remaining *cetteux que vies,*) there would be a reversion which the heir might take as special occupant; but this seems to be doing considerable violence to the words of the will. The devise is indefinite, and must, it would seem, be read as if it had been a devise "to *Elizabeth Robinson*, if *John Dowson* and *Thomas Robinson*, or the survivor of them, shall so long live." And as an estate *pur auter vie*, if so limited at its creation, would go to the executors and administrators of the grantee by force of the statute, so it is conceived it must go to the executors or administrators of the devisee of such an estate; for whether the gift proceed from a party who is seised in fee, or from the tenant *pur auter vie* only, does not seem to make any difference in the rule of construction. The rule, that an indefinite devise passes only an estate for life, (a harsh and narrow rule, which the Courts have struggled to break through, and to which there are at this day numerous exceptions,) appears to flow from the laws of tenure, which required the word "heirs" to limit an estate of inheritance, (Litt. s. 1.) The question seems to be, whether a rule founded on the necessity of words of limitation to create an estate of inheritance, can properly be extended to the transfer of an estate which is not an estate of inheritance, and which words of limitation were not requisite even to create. (And see *Styleman* v. *Sympson*, *ante*, 259, n.) The heir does not inherit as heir, but succeeds as special occupant, designated by a reference to his character of heir. Not being *in* as heir, he was not subject to specialty debts. (1 Vern. 234, 2 Vern. 719, 7 Ves. jun. 438, 4 T. R. 229.) Succeeding to a particular estate by the special designation of the party, he appears not to be within the scope of rules applicable to inheritances devolving by destination of law. The argument may be put thus: "If a *devise* to *A.* of land held for the life of *B.* requires words of limitation to pass a larger estate than for the joint lives of *A.* and *B.*, *à fortiori*, a *grant* (in which *nemo plus donásse præsumitur quam*

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in donatione expresserit) to *A.*, *habendum* for the life of *B.* will pass only an estate during the joint lives; if so, the land would always revert to the lessor on the death of *A.*, and there could be no general occupant at common law. But there was a general occupant at common law; therefore a devise to *A.* of land held for the life of *B.*, without words of limitation, will pass a larger estate than for the joint lives of *A.* and *B.* The word "heirs," in the original grant to *Thomas Dowson*, was not a word of *limitation of the estate*, for the *same* quantity of estate would have passed from the grantor under a grant to *Thomas Dowson*, without more; it merely nominated to the *occupancy* of the estate granted, in case the grantee should die before the measure of its duration had been fulfilled; and where terms would be nugatory as words of limitation in a deed granting the estate, it seems difficult to conceive that they are not only operative but essential in a will to devise it. It would seem that the estate might have been devised to *Elizabeth Robinson*, her executors and administrators, (Sugd. Powers, 161, n.; *Ripley* v. *Waterworth*, 7 Ves. 425; and see 2 Vern. 264;) and if that be so, the argument for the plaintiff would go to apply the rule which requires the word "heirs" to pass the inheritance, to a case where even personal representatives might have been destined to succeed. The power of devising an estate *pur auter vie*, seems to include the power of nominating a special occupant to succeed, in the event of the devisee's dying before the estate is determined. Then the question is, whether such a nomination is necessary to make the disposition of the devisor's estate complete. Suppose the estate to be originally granted to the lessee and his executors and administrators, or to the lessee generally; in both which cases the lessee would take the same estate in quantity of interest, as in the principal case, the argument for the lessor of the plaintiff would require the insertion of words of limitation in the devise. But according to Lord *Hardwicke*'s judgment, in *Williams* v. *Jekyl*, (2 Ves. sen. 681,) where an estate is granted to *A.*, *habendum* to *A.*, his executors and administrators, for the life of *B.*, the executor of *A.* takes as special occupant, subject to a power in *A.* to intercept the special occupancy of the executor, by disposing of the estate by alienation or by will; and his lordship was of opinion, that if *A.* aliened or devised to *C.* without saying more, the whole interest for all the lives would vest in *C.*, who is put in the place of the executor; adding, "I need not determine how it would be of an estate *pur auter vie*, limited to one *and his heirs*, for that is not this case." When it is considered that an estate *pur auter vie*, granted to a man and his heirs, has no descendible or inheritable qualities, (7 Ves. jun. 425,) and that every person succeeding on the death of the original grantee must take as special occupant, the distinction between the mode in which the estate vests in the heir, and the mode in which it vests in the executor, appears to amount to little. In *Micfield* v. *Kendal*, (Barnard. Chan. Rep. 49,) the Master of the

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Rolls said, "It has been held, that if lands are granted to *A.* and his heirs for three lives, he may grant it to *B.* and his executors for those lives. So if granted to *A.* and his executors for three lives, he may grant it to *B.* and his heirs during those lives. Whence it follows, that if one of these limitations be in the premises, and the other in the *habendum*, the *habendum* shall take place. As if the premises are to *A.* and his executors during the life of *B.*, *habendum* to *A.* and his heirs during *B.*'s life, the heirs shall have the benefit of the estate. So if the premises are to *A.* and his heirs during *B.*'s life, *habendum* to *A.* and his executors during *B.*'s life, the executors shall have the benefit of it. Because the *habendum* does not attempt to give a less or larger estate than is contained in the premises, but is merely explanatory."

With regard to the intention of giving an estate for the life only of the devisee, supposed to be apparent on the face of the will, (*ante*, 249, 254,) it may be questionable whether the words "for leasing the half ox-gang after my decease," mean any thing more than that the loss of a life on the estate, arising from the death of the testator, was to be made good by a renewal, to be purchased at the expense of the testator's estate.

And see *Bearcroft* v. *Geery*, 2 Keble, 250; *Sheffield* v. *Lord Mulgrave*, 5 T. R. 570.

A copyhold estate was always incapable of a general occupancy. The freehold being in the lord, there could be no failure of a tenant against whom a stranger might bring his *præcipe*, and the charge upon the freehold ceased as soon as there was no person capable of taking within the terms of the grant; and the possession reverted, and still reverts, to the lord; whereas in granting an estate *pur auter vie* at common law, the grantor absolutely divested himself of the freehold during the life of *cestui que vie*. *Van* v. *Howell*, 1 Roll. Abr. 511, Copyhold (L.) pl. 3; *Right* v. *Bawden*, 3 East, 271; *Zouch* d. *Forse* v. *Forse*, 7 East, 186, 3 Smith, 191 *S. C.*; *Smartle* v. *Penhallow*, 6 Mod. 65, 1 Salk. 188, 2 Lord Raym. 994 *S. C.*; *Doe* d. *Lempriere* v. *Martin*, 2 W. Bla. 1150. Lord *Coke*, however, seems to have thought that there might be a general occupant of a copyhold. He says, (Complete Copyholder, sect. 56,) "If a copyhold be granted *durante vitâ*, and the grantee dieth, living *cestui que vie*, and a stranger entereth as a general occupant, he shall be admitted and shall pay a fine." "And so if a copyhold be granted to one and his heirs *durante vitâ*, and the grantee dieth, and his heir entereth as a special occupant, where by the custom of the manor a copyhold may be extended, upon the extent the party shall be admitted, and shall pay a fine." And see *Doe* d. *Nepean* v. *Goddard*, 2 D. & R. 773, 1 B. & C. 522. As to other customary tenures, *vide ante*, vol. i. 369 (*c*).

At common law there could be no general occupancy of things lying in grant, as of a rent. *Ante*, 253 (*d*); Cro. El. 721; *Holden* v. *Smallbrooke*, Vaugh. 194, 2 Roll. Abr. 150, Occupant, C. pl. 1 & 2; *Smartle* v. *Penhallow*, 1 Salk. 189, 2 Lord Raym. 994, 1000. But according to an *obiter dictum* of Lord *Talbot*, in *Rawlin-*

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son v. *Duchess of Montague*, 3 P. Wms. 260, n., "If since the statute of frauds a rent be granted to *A.* for the life of *B.*, and *A.* die living *B.*, *A.*'s executors or administrators shall have it during the life of *B.*; and the statute in that case does not enlarge, but only preserves the estate of the grantee." And see 6 Mod. 66, n.; *Kendall* v. *Micfield*, Barnard. Chan. Rep. 49. But the point is not noticed in Mr. Vernon's report of *Rawlinson* v. *Duchess of Montague*, 2 Vern. 667; and the reasons given in 7 East, 193, for not extending the statute of frauds to create an occupancy of a copyhold, appear to apply with equal force to estates *pur auter vie* in incorporeal hereditaments. And see 2 Bla. Com. 260. The question was lately raised by a demurrer to a plea in covenant upon an annuity deed. The annuity was granted to *A.* for the life of *A.* *B.* and *C.* *A.* died, and the action was brought by his executors. The objection, therefore, appeared on the face of the declaration; but the defendant not chusing to rest his defence upon this single point, pleaded, amongst other things, the death of the grantee; to which plea the plaintiff demurred. The case was afterwards compromised.

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TRESPASS for breaking and entering the close of plaintiff, pulling down part of a wall of plaintiff there standing, carrying away and disposing of the materials, erecting another wall and a building upon the wall of plaintiff, keeping and continuing the same so erected, and throwing rubbish upon the close of plaintiff. Plea, not guilty. At the trial, before *Alexander*, C. B., at the Norwich Summer Assizes, 1827 (*a*), the case was this:—

The wall in question was situated between a cottage and garden belonging to the plaintiff, and a yard containing several cottages belonging to the defendant; and separated the one from the other for a distance of twenty feet. In July, 1825, the defendant pulled down that part of the wall, and on the old foundation of it erected another wall, forming part of a cottage. It appeared that the wall had

Trespass does not lie by one part owner or tenant in common of a party wall against the other. Where, in such an action, the judge left it to the jury, whether the wall was the *common property* of plaintiff and defendant, and they found that it was *a party wall*, and the judge thereupon directed them to find for the defendant:—Held, that such direction was right.

(*a*) Counsel for the plaintiff, *Storks*, Serjt. and *F. Kelly*; for the defendant, *Robinson* and *Wallinger*.

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stood half upon land belonging to the plaintiff, and half upon land belonging to the defendant. There was evidence given of some acts of ownership exercised by both parties upon the wall; and it appeared that each had at different times done some repairs on his own side of the wall. The learned Judge left it to the jury to say, whether the wall belonged exclusively to the plaintiff, or exclusively to the defendant, or whether it was the common property of both, directing them in the latter case to find a verdict for the defendant. The jury, after deliberation, stated their opinion to be that the wall was a party wall, and having done so, found their verdict, under the learned judge's direction, for the defendant. In Michaelmas Term 1827, a rule was obtained for a new trial, upon the ground that the learned judge had misdirected the jury, against which,

Robinson, with whom was *Wallinger*, shewed cause. The direction of the learned judge was right. This case is distinguishable from *Matts* v. *Hawkins* (*a*), where it was held, that if two persons have a party wall, one half of the thickness of which stands on the land of each, they are not therefore tenants in common of the wall, or of the land on which it stands, though the wall was built at the joint expense of the two proprietors; because there the wall was built under the authority of the Building Act, 14 *Geo.* 3, c. 78, and the property in the wall followed the property in the ground on which it was built. But it is not distinguishable from the very recent case of *Wiltshire* v. *Sidford* (*b*), which is an express authority for saying that this action is not maintainable, for it was there decided, that trespass does not lie by one part owner of a party wall, against the other part owner. (Here the Court stopped him.)

Storks, Serjt. and *F. Kelly*, contrà. The inference drawn

(*a*) 5 Taunt. 20.

(*b*) Ante, i. 403. And see *Noye* v. *Reed*, ante, i. 68.

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by the jury was not warranted by the evidence, therefore the direction of the learned judge, founded upon that inference, was erroneous. This is a very different case from *Wiltshire* v. *Sidford*, for here the wall was entirely pulled down by the defendant. [*Holroyd*, J. But he rebuilt it on the same foundation.] The presumption adopted by *Bayley*, J. in *Wiltshire* v. *Sidford* was reasonable and probable and convenient there, namely, that where the builder of two houses grants off one, he grants the whole party wall in undivided moieties; but it does not arise here. *Matts* v. *Hawkins* is much more analogous to the present case. [*Bayley*, J. I cannot say I think so. There the wall was built under the provisions of the Building Act, half on the ground of each party, so that the origin and foundation of it was perfectly well ascertained and known. *Holroyd*, J. Here, unless you can shew that each is owner *ad medium filum*, the presumption surely is that both are tenants in common. *Bayley*, J. And the question whether that presumption arose out of the evidence, was left to the jury.] If the parties were tenants in common of the wall, the defendant had no right to pull it down, and having done so, trespass lies against him at the suit of the plaintiff, *Co. Litt.* 200, where several examples are put. "If two tenants in common be of a dove-house, and the one destroys the old doves, whereby the flight is wholly lost, the other tenant in common shall have an action of trespass. And so is it if two tenants in common be of a park, and one destroyeth all the deer, an action of trespass lieth. If two tenants in common be of land and of mete stones, *pro metis et bundis*, and the one of them take them up and carry them away, the other shall have an action of trespass. If two tenants in common be of a folding, and the one of them disturb the other to erect hurdles, he shall have an action of trespass." The act in this case was done against the plaintiff's will, and after notice from him not to do it. If the wall was not entirely destroyed, still it was entirely changed, and that is sufficient to give a right of action. [*Bayley*, J.

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Suppose one of two tenants in common of a wall raises it; will trespass lie against him by the other?] It is submitted that it would, for that would amount to a *legal* destruction of the wall. [*Holroyd*, J. Suppose one of two tenants in common of a field ploughs and sows the field, and reaps the whole crop?] That would be a different case, because there the entire perception by the one would be only temporary; but here there is a total exclusion. [*Holroyd*, J. In the case put by my brother *Bayley*, of heightening a wall, the only question would be whether both would or would not be tenants in common of the new part? *Bayley*, J. Suppose two are tenants in common of a close, and one builds a wall across it, can the other maintain trespass against him?] It is submitted that he might. There would be an actual ouster there, and so there is here; and then an action lies. *Littleton*, s. 322, says, "If two have an estate in common, and the one occupy all, and put the other out of possession and occupation, he which is put out of occupation shall have against the other a writ of *ejectione firmæ*." Upon which Lord *Coke* says (*a*), "here are to be understood diversities between actions which concern right and interest, as of *ejectione firmæ*, &c., and actions concerning the bare taking of the profits arising from the land, or doing of trespass upon the land; for the right is several, and the taking of the profits in common." In *Goodtitle* v. *Tombs* (*b*), it was held that a tenant in common who had recovered in ejectment, might maintain an action for mesne profits, which is an action of trespass, against his companion. In this case there was an actual ouster, at least during the period occupied in the pulling down and rebuilding the wall.

BAYLEY, J.—I am clearly of opinion that this rule ought to be discharged. If the wall was exclusively the plaintiff's, the action was maintainable. If the wall was exclusively

(*a*) Co. Litt. 99 b. (*b*) 3 Wilson, 118.

the defendant's, the action was not maintainable. If the wall belonged to both jointly, the action was not maintainable. The single question in the cause was, whether the plaintiff and defendant were tenants in common of the wall, or not. There was strong evidence of a common user of the wall; and the use made of the wall was good evidence from which to judge of the nature of the right to the wall. The jury have found that it was a party-wall. They were directed by the learned Judge to say whether the wall was the common property of both parties, and if they thought it was, to find for the defendant. They found that it was a party-wall, and then, as the learned Judge reports, they found for the defendant by his direction. If there was any thing erroneous in that mode of leaving the case to the jury, which, however, I do not see that there was, that should have been suggested at the time; it is too late to suggest it now. The land on which the boundary wall of two adjoining houses stands, may belong half separately to each respective proprietor of the houses, or it may all belong in common to them both. In this case there was no evidence to shew in what mode the land belonged to the parties. If it belonged originally half to each of them separately, the most prudent course they could pursue was to agree to use the land, and the wall that stood upon it, as common property; to hold them both as tenants in common; and the strong probability is, that they did so agree. I cannot help thinking that the probable state of things in this case was, not such as it was in *Matts* v. *Hawkins*, but that both the land and the wall were the common property of both parties; and there would be no propriety in sending down the cause to a new trial, against the probability of the case. Then with respect to the point of law, assuming these parties to be tenants in common, if there had been an utter and entire destruction of the wall, perhaps an action of trespass would have been maintainable. But there was no such thing. There was merely a temporary removal of the wall, done for the purpose and

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with the intention, not of destroying the wall, but of renewing it; and there is no instance to be found where it has been held that trespass would lie by one tenant in common against another under such circumstances. If the wall has been raised beyond its former height, and improperly, the plaintiff may cause it to be lowered; but he cannot maintain an action of trespass for that. Upon the whole it seems to me that this case must be governed by that of *Wiltshire* v. *Sidford*, which I consider to have been rightly decided, and therefore that the action cannot be maintained.

HOLROYD, J.—I am of the same opinion. It lay upon the plaintiff to make out clearly that he had a right of action. There was evidence to go to the jury, and which was left to the jury, upon the question, whether the wall was common property or not; and they have found that it was. Then it is quite clear that trespass will not lie by one tenant in common against another, for such an act as is here complained of; for there was no destruction of the wall itself, and no ouster of the plaintiff from his occupation of it, within the fair legal import of those terms.

LITTLEDALE, J.—I am also of the same opinion. There was evidence upon which the jury might properly be desired to decide, whether the wall was the exclusive property of either party, or the common property of both. The jury were desired, and as it seems to me in correct terms, to decide that question, and they have done so. Undoubtedly there are cases in which it has been held that actions would lie by one tenant in common against the other, some of which are cases of actions of ejectment (*a*), others of trespass (*b*), and others of waste (*c*); but in all of

(*a*) *Doe* d. *Fisher* v. *Prosser*, Cowper, 217; *Doe* d. *Bristow* v. *Pegge*, 1 T. R. 759, n.; *Doe* d. *Hellings* v. *Bird*, 11 East, 49.

(*b*) *Barnardiston* v. *Chapman*, 4 East, 121, n.; *West* v. *Pasmore*, Bull. N. P. 35.

(*c*) *Martin* v. *Knowllys*, 8 T. R. 145; and see *Com. Dig. Estate*, K. 8.; 14 Vin. Abr. 512.

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them it will be found, that in order to support ejectment there must be an actual ouster of the party, and in order to support trespass or waste, a complete and absolute destruction of the thing. Here there was no actual ouster of the plaintiff, so that he could not have maintained ejectment; nor, if there had been, would that have supported this action, which is trespass, for mere ouster will not support an action of trespass, *Taylor* v. *Cole* (*a*); neither was there any absolute destruction of the wall, for which trespass is maintainable. The only remedy the plaintiff could possibly have, would be an action of waste, and I doubt if even that would be maintainable under circumstances such as these.

Rule discharged.

(*a*) 3 T. R. 292, where it is said, in trespass for breaking and entering plaintiff's house, and expelling him therefrom, the breaking and entering are the gist of the action, and the expulsion is merely aggravation; therefore a justification as to the breaking and entering will cover the whole declaration.

The KING v. The INHABITANTS of LOUTH.

An apprenticeship to two masters to serve them consecutively in distinct trades, is valid, and requires only a single stamp.

THE pauper, *Benjamin Furnish*, being legally settled in the township of Baildon, in the county of York, was, in the year 1780, bound apprentice to his father, *Thomas Furnish*, a weaver, and to *John Grozer*, a woolcomber, both then residing in the township of Leeds, in the county of York, *but not co-partners*, by indenture duly executed by all parties, upon which there is only one 5*s*. stamp, and of which the following is a copy:—

"This indenture, made the 1st day of January, in the 20th year, &c. and in the year of our Lord 1780, between *John Grozer*, of the parish of Leeds, in the county of York, weaver, and *Thomas Furnish*, woolcomber, of the one part, and *Benjamin Furnish*, of the parish aforesaid, of the other part, witnesseth that the said *Benjamin Furnish*

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hath of *his own free will*, and with the consent of his parents, put and bound himself apprentice to and with the said *John Grozer* and *Thomas Furnish*, and with them after the manner of an apprentice to dwell, remain and serve from the date hereof, for, during and until the term of seven years thence next following be fully completed and ended; during all which term the said apprentice his said *masters* well and faithfully shall serve, *his* secrets shall keep, *his* lawful commands shall do, fornication or adultery shall not commit, hurt or damage to his said *master* shall not do, or consent to be done, but to his power shall let it, and forthwith his said *master* thereof warn; taverns or alehouses he shall not haunt or frequent, unless it be about his *master's* business there to be done; at dice, cards, tables, bowls, or any such unlawful games he shall not play; the goods of his said *master* shall not waste, nor them lend or give to any person without his *master's* licence; matrimony within the said term shall not contract, nor from his *master's* services at any time absent himself; but as a true and faithful apprentice shall order and behave himself towards his said *masters* and all, as well in words as in deeds, during the said term; and a true and just account of all his *master's* goods, chattels and money committed to his charge, or which shall come to his hands, faithfully he shall give at all times, when thereunto required by his said *masters*, executors, administrators or assigns: and the said *John Grozer*, for himself, his executors and assigns, doth covenant, promise and grant, by these presents, to and with the said *Benjamin Furnish*, apprentice, that the said *John Grozer* and *Thomas Furnish*, *his* executors, administrators or assigns, shall and will teach, learn and inform him, the said apprentice, or cause him to be taught, learned and informed in the mistery of the trade of stuff-weaving and woolcombing, which the said *masters* now useth, after the best manner or knowledge which he or they may or can, with all circumstances thereunto belongs: and also shall find and provide to and for him, the said apprentice, sufficient and enough

of meat, and that the said *John Grozer* shall find and provide him meals, drink, washing and lodgings, for the first four years, (to and not to exceed eight hanks per day, and to have four hanks allowed for looming; to have three days each year for himself, and to have four shillings for a low count, if he works any overwork, and so in proportion): the said apprentice to serve the latter three years with *Thomas Furnish*, (and not to exceed five pound per day); the said apprentice to receive one shilling per year wages; and the said *John Grozer* to be absolutely free from the said apprentice at the end of four years from the date hereof; and the said apprentice not to have above three days if he should have to stand for work. And for the true performance of all and singular the covenants and agreements aforesaid, each of the parties aforesaid doth bind himself unto the other firmly by these presents. In witness whereof," &c.

The pauper served and resided under such indenture at Leeds for four years and threee months, and then removed to Louth.

Hildyard and *Whitehurst*, in support of the order of sessions. The objections upon which it will be argued that this indenture is invalid, and that a service under it confers no settlement, are understood to be, that two trades are mentioned in the indenture; that the masters are not partners; that the indenture contained two distinct bindings, and therefore required two stamps. At common law a man may follow two trades; *French* v. *Adams* (*a*); and if a man may follow two trades, he may surely learn them. An apprenticeship, at common law, is nothing more than a contract on the one part to teach, and on the other to learn a trade (*b*); nor can it make any difference whether it is to learn one or more trades; it is still a contract to teach and learn a trade, nor are there any decisions to the contrary.

(*a*) 2 Wils. 168.

(*b*) Per Ld. *Kenyon*, C. J., in *Rex* v. *Rainham*, 1 East, 531, and per *Grose*, J., in *Rex* v. *Laindon*, 8 T. R. 379.

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No statute has made any alteration in this respect. (This was admitted by the counsel for the respondents.) But even supposing this was not so, this is not a binding to two trades, but to two different branches of the same trade. It is called mystery and trade, not *mysteries or trades*, in the indenture, and is not found otherwise by the sessions. As to the binding being to two masters, the same answer may be given as to the two trades. Indeed, the legislature have recognized the legality of this; for the 56 *Geo.* III. cap. 139 (*a*), directs, that "before any child shall be bound apprentice by the overseers of the poor, such child shall be carried before two justices of the peace of the county, &c. who shall inquire into the propriety of binding such child apprentice to the person *or persons* to whom it shall be proposed, by such overseers, to bind such child; and such justices shall particularly inquire and consider whether such person *or persons* reside, or have his, her *or their* place *or places* of business within a reasonable distance," &c. This statute evidently contemplates that there may be a valid binding to several *persons*, carrying on distinct trades at several *places*, which is conclusive to shew the legality of such binding, though this was not a case of a binding by overseers, and was before the statute. It was not necessary that the masters should be co-partners; though it may be said that they were co-partners with respect to this particular contract. (Here it was stated that the only objection relied on was, the want of a second stamp.) With respect to the objection as to there being but one stamp on this indenture: it is but one indenture, made at one time, by parties each covenanting with the other; and that part which states that *Grozer* is to be free at the expiration of four years, applies only to the pauper's maintenance, or as to *Grozer's* personally teaching him; it was not in any way intended that *Grozer* was to be free from his previous covenant of teaching him, or causing him to be taught, or the whole term of seven years; but supposing

(*a*) Sect. 1.

that it is not so, but two consecutive services, still there is nothing illegal in it, and the principle that pervades all the cases is that where it is substantially one transaction, though there may be several parties, having separate interests, and making distinct stipulations, yet one stamp is sufficient. *Bowen* v. *Ashley* (*a*), *Davis* v. *Williams* (*b*), *Baker* v. *Jardine* (*c*), *Goodson* v. *Forbes* (*d*), *Boase* v. *Jackson* (*e*), *Doe* d. *Copley* v. *Day* (*f*). Separate admissions to the freedom of a corporation, are entirely distinct transactions, and therefore the decision of this Court in *Rex* v. *Reekes* (*g*) does not apply.

Clarke and *Clinton*, contrà. There were two distinct bindings, giving all the effect of an assignment. [*Bayley*, J. It is quite clear that successive services were meant.] It is the same thing as if two mortgagors conveyed their estates by the same instrument. [*Bayley*, J. Would this have been a good binding before the stamp act?] It is not put on the ground of fraud, but that it was not receivable in evidence. [*Holroyd*, J. It is all one act. *Bayley*, J. The circumstance of the binding being for seven years is important.] There was an obligation on the second master to teach the apprentice, or to cause him to be taught, if the first master died. [*Littledale*, J. It is only the covenant of *Grozer*.] There was no community of interest. This case was more like *Doe* d. *Copley* v. *Day* (*h*). In *Goodson* v. *Forbes* there was a community of interest; not so here. If it had been necessary that the apprentice should learn both trades, he would naturally learn to comb the wool first. If there was no community of interest, a second stamp would clearly be necessary. If there is such a community, the instrument operates as an assignment.

(*a*) 1 N. R. 274.
(*b*) 13 East, 232.
(*c*) 13 East, 235, n.
(*d*) 6 Taunt. 171.
(*e*) 3 Bro. & Bing. 185.
(*f*) 13 East, 241; and see *Rex* v. *Carlisle*, 1 Chit. Rep. 451.
(*g*) 2 Lord Raym. 1445; 1 Stra. 716.
(*h*) 13 East, 241.

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Assuming that *Grozer* was bound during the whole time, service under the father for the last three years would be an assignment. No assignment would leave the first master liable, as he is left here. The supposed community of interest arises out of this assignment. If there is no community of interest, the cases cited do not apply. Here were two separate bindings.

BAYLEY, J.—It was formerly supposed that under the statute of *Elizabeth* (*a*) an apprenticeship for less than seven years was void. It has since been decided otherwise, though certain benefits attached on a seven years' binding before 57th *Geo.* 3. It appears to me that this is a fair indenture, to constitute the party an apprentice for seven years, which is the period contemplated by the policy of the law. There is certainly a degree of peculiarity about this indenture. In ordinary cases, the binding is for the purpose of learning one trade, and is for seven years; a period long within which the trade will have been learnt. In seven years a party may have time to learn two distinct trades, and the acquisition of one may materially assist the party in practising the other. The father of course is anxious that his son shall learn as much as possible, and that he shall also be under proper control. The object was to acquire instruction. The father prevails upon a master to take his son for less than seven years, but at the same time he wishes to provide a person who shall stand in the relation of master to his son during the remainder of that period. He might not wish to take an assignment. This is nothing more than a stipulation, and, in my opinion, a reasonable one, that there shall be an apprenticeship for seven years, during which the apprentice shall be learning two trades, and that one period shall be fixed for learning one trade, and another for another. I think this is an indenture for one period of seven years, and that the stamp is sufficient.

(*a*) 5 Eliz. cap. 4.

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HOLROYD, J.—I am of opinion that the stamp is sufficient. The contract is for a certain period, though the apprentice was to serve two masters, who carried on different trades. The next question is, whether the indenture is rendered void by the stamp act, which would then operate penally by creating a forfeiture of the advantages to be derived by service under an apprenticeship. I am of opinion that this indenture is not void under the stamp act. It would be otherwise if there was any fraud upon the revenue. It was one transaction. No fraud was found or suggested, nor could there be. This is but one indenture, which is binding for one part of the term to one person, and for the remainder to another person.

LITTLEDALE, J.—One stamp is quite sufficient. Suppose before the statute of *Elizabeth* (*a*) parents were desirous that a boy should learn two trades by a perfectly distinct contract, if persons could be found who would take him, and he was bound to one for four and to another for three years, this might be done by separate instruments, but it would be more natural to do it by one instrument only. The statute of *Elizabeth* introduces a regulation respecting seven years. This furnishes an additional reason for the parties making it one entire apprenticeship. Then comes the act imposing the stamp duty, with reference to which it has been said that this is a binding for four years, and that it operates afterwards as an assignment, or as a covenant to assign. Now, an assignment would be to another person in the same trade. It cannot be considered as a fraud on the revenue, that a man enters into a contract which he might fairly have entered into at common law. This is only one indenture of apprenticeship.

Rule discharged.

(*a*) 5 Eliz. cap. 4; and see Com. Dig. Justices of the Peace, B. 55, &c.

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The KING *v.* The INHABITANTS of BROMYARD.

The court of quarter sessions has no power to quash a poor's rate for a defect not pointed out in the notice of appeal, though it be apparent on the face of the rate.

UPON an appeal of *Edward West* against a rate, or assessment, made for the relief of the poor of the township of Bromyard, in the county of Hereford, the sessions quashed the rate, subject to the opinion of this Court, upon the following case:—

The particular grounds of appeal stated and specified in the notice of the appeal were only, "That I am overrated in the said rate or assessment, in respect of the yearly value of the lands and tenements for and in respect of my occupation of which I am assessed or charged in the said rate or assessment; and also that no part, or a very small part only, of the lands and tenements in respect of which I am assessed or rated in the said rate or assessment is situate in the said town; and also that I do occupy no ratable *property*, or ratable property to a much less amount than that for which I am so rated and assessed in the said rate." On the rate in question being produced, it appeared entitled "An assessment made upon the several occupiers of lands, tithes, and hereditaments in the town of Bromyard, in the county of Hereford, of one shilling in the pound for the necessary use of the poor, and other purposes, relative to the acts of Parliament, granted at a committee meeting the 8th day of November, 1827, by *Thomas Barneby*, clerk, and *Charles Scott Luxmoore*, Dean of St. Asaph, two of his majesty's justices of the peace in and for the said county of Hereford."

The property in respect of which the appellant and several others were rated was specified, but no property was stated in respect of which the great majority were rated, the names of the persons and the sums only being inserted.

It was contended that the court of quarter sessions ought not to examine or inquire into this objection to the

rate, or to take notice of it, as it was not specifically pointed out by the notice of appeal. The sessions, however, determined otherwise, and on this objection quashed the rate, subject to the opinion of the Court of King's Bench.

Justice, in support of the Order of Sessions. The 41 *Geo.* 3, c. 23, s. 4, which directs that the grounds of the intended appeal shall be stated in the notice, does not limit the jurisdiction of the magistrates with respect to defects in the rate before them; and it would be very inconvenient if any other course were adopted. In *Rex* v. *The Undertakers of the Aire and Calder Navigation* (*a*), it was held, that the poor rate must shew upon the face of it in respect to what property the assessment is made. Here the parties have no means of ascertaining whether they or their neighbours are correctly assessed or not. This rate is bad *per se*. The question is, whether the sessions have the power of deciding upon a defect not appearing in the notice of appeal. The object of the notice is to enable the respondents to be prepared with evidence. 2 Nol. 522. Thus it is a matter of evidence whether the proper officers have signed the rate. The statute requires "that in all notices of appeal, the particular causes or grounds of appeal should be stated and specified, and upon the hearing of any appeal from or against any such rate or assessment, or account, the Court of General or Quarter Sessions to which such appeal shall be made, shall not examine or inquire into any other cause or ground of appeal than such as are, or is stated and specified, in the notice of appeal." The objection upon which the sessions decided was not a ground or cause of appeal, as between the parties. The act does not prohibit the magistrates from deciding upon grounds not stated in the appeal, but they are not to *examine or inquire into* other matters of fact; but the detection of this patent defect in the rate itself requires neither examination nor inquiry, which are terms that relate to evidence.

(*a*) 4 D. & R. 253, 2 B. & C. 713; 2 D. & R. M. C. 341.

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[*Holroyd*, J. One of the objections pointed out by Mr. *Nolan* is, defect in point of form. Suppose the property of one person only was omitted to be stated in the rate, could not the parties have come prepared with evidence as to the property occupied by that person?] The magistrates are not bound to correct the rate, though they have authority so to do if they chuse to venture upon so hazardous a step; and they will amend formal defects, as wrong dates or names. [*Bayley*, J. Suppose you go to the trial of an appeal, without any notice at all.] There must be a notice. [*Bayley*, J. That puts an end to your case.] The question here is not between the parties. The respondents in effect are the magistrates, who say there is no rate. [*Bayley*, J. Suppose a party has paid the sum assessed on him, he could not recover that sum again on the ground of there being no rate. *Littledale*, J. The question is, whether the magistrates have a right to arrest judgment *ex officio*. *Holroyd*, J. Should not parties come prepared to answer objections in point of law, as well as those arising upon matter of fact?] The want of notice could not work any injury, because the respondents could not be prepared with evidence to shew that such a rate as this is good. The Court is called upon to confirm an illegal rate. [*Bayley*, J. You assume that the rate is illegal. If *A. B.* were rated at £5, and did not appeal, but refused to pay, might not a distress legally be made? The omission to mention the estates occupied by the party might be made a ground of an appeal.] It does not follow that because *West* might have introduced this point into his notice, the magistrates are restrained from acting upon the defect. [*Littledale*, J. They might have said, "If the parties are satisfied, though their property is not stated in the rate, that is no affair of ours." *Holroyd*, J. Have they any jurisdiction over what is not stated in the notice?] It was their duty to confirm or to quash. [*Holroyd*, J. They might take a middle course and dismiss the appeal, and leave the rate to take its legal fate. If they confirm, they do an act to uphold the

rate.] This is in effect a dismissal. [*Bayley*, J. If they have dismissed, they have quashed what was not before them, and that with costs.]

Campbell, contrà, was stopped by the Court.

BAYLEY, J.—The Court has never decided that the omission of the property makes the rate illegal, though if pointed out as a cause of appeal it would be a ground for quashing the rate. If any person is aggrieved by such omission, he may make that the ground of appeal to the justices. There are many cases in which the specification of the property might convey no information of which all the parties interested might not be already in possession. The party rated has a right to know for what he is rated, and other persons have a right to see who are duly rated and who not. The 41 *Geo.* 3. has for its object to lessen the labour of the sessions, and to avoid the expense of bringing unnecessary witnesses, and for this purpose requires a notice specifying the grounds of appeal. I put the question, whether if no ground of appeal was stated, such a notice would be good. It has been properly admitted that it would be bad. You are not at liberty to enter into this ground of objection merely because you have given notice of another ground for which there is no foundation. This would be putting a party to the expense of proving the case pointed out by the notice, and then abandoning it and going into that from which, without such notice, you would have been excluded. It is said that the statute does not apply to an objection apparent on the rate itself. Inquiring may mean a different thing from examining, and if the legislature, in using both these words, can be understood to have used them in a different sense, we are bound to give effect to that intention. Discussing is an examination. The discussing a question may be fairly considered as examining into a question. It would be inconvenient if you were at liberty to depart from the defect pointed out in

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the notice, and to go into what would be merely a ground for quashing. This rate is said to be illegal; but that is not a proper term. It is liable to be quashed, but if no objection is taken, such a rate is legal and good. If a warrant of distress were issued against a party so rated, and who had neglected to appeal, it would be no answer to such distress, that the property was not set forth in the rate. The party should have appealed, for the rate is not bad, though liable to be quashed. In the case of *Rex* v. *Aire and Calder Navigation*, the objection was specifically pointed out in the notice of appeal.

HOLROYD, J.—The court of quarter sessions have no jurisdiction without a notice of appeal, or over any thing which is not comprised in the notice, except when, in furtherance of the 5th section of 41 *Geo.* 3. cap. 23, they hear and decide by consent of parties, upon grounds of appeal not stated, or mistated, in such notice. The statute says "the causes of appeal *shall* be stated." There the words are directory; but the statute is not merely directory, for it goes on to say that the Court shall not examine or inquire into any other cause or ground of appeal. I construe these words with reference to the preamble, which states "that the quashing or setting aside of rates or assessments made for the relief of the poor is attended with great inconvenience, and it hath happened in consequence of the rate or assessment being quashed or set aside on a notice of appeal against the whole rate being given, the churchwardens and overseers of the poor have not had any money in hand for the relief and maintenance of the poor." We ought to give the statute such a construction as will fairly meet the object of the legislature, and prevent the inconvenience intended to be remedied.

LITTLEDALE, J.—I am entirely of the same opinion. By the statute of *Elizabeth* the rate was to be made on particular parties for the purpose of raising money for the

relief of the poor. The principal object of that statute was to say how much should be raised, and upon whom. The rate ought to go on and specify in respect of what property the assessment was made, in order that it may be seen that all ratable property is assessed, and that persons are not rated for property which they do not occupy. A third object is, to see whether the property rated is of such a nature as to be the proper subject of a rate. If the property is not stated the rate is defective and informal. This is the proper subject of an appeal. Then comes the act requiring that the Court shall not examine or inquire into matters not stated in the notice. If it is mentioned, they are bound to inquire. It has been said that the Court is bound to inquire *ex officio*. I do not see what authority they have to inquire, or why they are so bound. The first object of an appeal is to see that the party is not over-rated, the second that all persons are included. If persons are satisfied, what right have the justices to interfere? Some townships are so small that parties may not wish to be informed in respect of what property the assessment is made. It is said that the words "examination and inquiry" refer to something which is to be ascertained by extrinsic evidence. The statute of *Elizabeth* (*a*), which creates the Court of Exchequer Chamber for redressing errors in the King's Bench, and that of *Edw.* 3. (*b*) for errors in the Exchequer, both use the word "examination" in the sense of inspection of the record; for though it may apply to error in fact (*c*), it would generally mean error in law.

Rule absolute.

(*a*) 27 Eliz. cap. 8.

(*b*) 31 Edw. 3. stat. 1. cap. 12.

(*c*) Errors in fact are examinable in the same court in which the erroneous judgment was pronounced, as they do not arise from any default of the Court; and it has been held that errors in fact *must* be submitted in the first instance to the same Court, *Roe* v. *More*, 2 Com. Rep. 597. Errors in fact are therefore cognizable in the Court of Exchequer Chamber only where, upon a writ of error brought in the

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Justice applied to the Court to direct continuances to be entered, in order that this appeal might be reheard.

BAYLEY, J.—We make the rule absolute. You can appeal against any other rate.

Court of King's Bench to *revoke* a judgment for an error in fact, that Court has pronounced a judgment of affirmance, or of *revocation*, which is erroneous in *law*.

The KING *v.* The INHABITANTS of GREAT SHEEPY.

An indenture of apprenticeship of an infant pauper sanctioned by the overseers and magistrates acting *bonâ fide*, is not avoided by its having been fraudulently contrived between the parent and nominal master, for the purpose of obtaining a premium from the parish and keeping such infant at home.

UNDER an order of the date of 5th May, 1827, made by the Rev. *Thomas Fawcett* and *William Crawley Brant*, two Justices for Oxfordshire, *Edward Burton* and *Mary* his wife, and their four children, were removed from Great Barford, Oxfordshire, to Great Sheepy, in Leicestershire, as the place of their legal settlement, and on an appeal against it at the Midsummer Sessions, 1827, for Oxfordshire, the Court confirmed the order of removal, subject to the opinion of this Court upon the following case:—

The pauper was bound apprentice by the churchwardens and overseers of Great Sheepy by a parish indenture of the 28th day of April, 1807, (the said pauper being then a poor child of the said parish, aged seven years, or thereabouts), to *George Wilkins*, of Deddington, in the county of Oxford, butcher, with him to dwell and serve from the day of the date of the said indenture until the apprentice should accomplish his full age of twenty-one years. The said parish indenture was in the usual form, and was duly executed by all the parties thereto, and in the margin thereof the magistrates duly signified their consent. The father of the pauper, whose last place of settlement was at Great Sheepy, had died four or five years before the date of the indenture, and thereupon his widow had gone to

reside with her father, *George Wilkins*, at Deddington, the parish of Great Sheepy relieving the widow till the pauper was seven years old. The parish then proposed to the mother to put the pauper out apprentice to Measham cotton works, and told her they should no longer relieve her unless the pauper was apprenticed. Upon this the mother requested the officers to bind the pauper to her father, *George Wilkins*, in order that the boy might not be removed from her. The parish officers consulted their rector (who was himself a magistrate) as to the propriety of acceding to this request, and having received his sanction, they and the mother, and *Wilkins* met together, and went before the justices without the pauper, for the purpose of binding him. The justices allowed the binding, and the indenture was executed by all parties, and a premium of 6*l.* was paid to *Wilkins* by the parish officers. There was nothing in the appearance of *Wilkins* to excite any suspicion that he was an improper person, and there was not any fraud or collusion on the part of the magistrates, or of the parish officers of the appellant parish. The pauper continued to dwell with *Wilkins* in the parish of Deddington after the execution of the indenture, running on errands, and doing whatever he was bidden to do, till after he was nine years of age, when he left his grandfather, and never afterwards returned to him; but after the binding he continued to go to school by day as he had gone before, except in the holidays, and he never was informed, nor did he know that he had been bound apprentice, neither did he receive any instruction in the trade of a butcher; and although *George Wilkins*, the master, had been a butcher, it did not appear that he ever killed meat after the binding, and he was a man of needy circumstances. Upon the above facts the sessions founded their judgment that the mother of the pauper and the grandfather had colluded together and fraudulently imposed the grandfather upon the parish of Great Sheepy as a proper master for the child, and on the ground of this fraud alone held that no settlement was gained under the inden-

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ture, though they acquitted the parish officers of Great Sheepy of all participation in the fraud, and found that they had acted *bonâ fide* in the matter.

Cross and *Abbott*, in support of the order of sessions. There was no inhabitancy in the respondent parish. [Lord *Tenterden*, C. J. It is not put upon that ground, but on fraud alone. Are there sufficient facts to find fraud, and if there was fraud, does that justify the avoiding the indenture?] It is found that the parties fraudulently imposed upon the magistrates. Great Sheepy is sixty miles from Deddington. This being a compulsory binding under the statute of *Elizabeth*, a concurrence of the justices was necessary. [Lord *Tenterden*, C. J. There are many butchers who kill no cattle. *Bayley*, J. What instruction could be given to a boy seven years old?] The boy was not himself aware that he was an apprentice, and could not have been punished for misconduct. The object of an apprenticeship is to learn a trade. Here he stays at home. The mother's object was to have the child with her. What the boy did for *Wilkins* was referable to his character of grandfather rather than to that of master, although in some cases it must be admitted that going on errands has been held a sufficient service, and in *Rex* v. *Charles* (*a*), the residence of an apprentice during a time when he was disabled from performing any service was held to be sufficient to confer a settlement. But there the party was clearly an apprentice. The justices have expressly found (*b*) that the binding was fraudulent; and Great Sheepy ought not to be burthened by the fraud of other parties.

Bligh, contrà, was stopped by the Court.

(*a*) Burr. S. C. 706. And see *Rex* v. *Sharrington*, 2 Bott, 499.

(*b*) As to the conclusiveness of such finding, see *Rex* v. *Llanwinio*, 4 T. R. 473; but see *Rex* v. *Tedford*, 2 Bott, 986; *Rex* v. *Haughton*, 1 Stra. 83.

Lord TENTERDEN, C. J.—No fraud was committed by the officers; they were imposed upon by the misrepresentation of others.

Order of Sessions quashed.

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The KING *v.* THOMAS ROGERS and others.

An order for stopping up a road, reciting "that the justices have, upon their view, found, *or* it has *appeared* to them," that the road is useless and unnecessary, is bad.

A ROAD in the parish of Stoke Prior, in the county of Worcester, was stopped up by the following order:—"We, the undersigned, the Right Hon. and Rev. *Walter Hutchinson* Lord *Aston*, and the Rev. *William Vernon*, Clerks, two of his Majesty's justices of the peace, acting in and for the middle division of the Hundred of Oswaldslow, in the county of Worcester, at a special sessions, holden at the Cross Inn, in the parish of Stoke Prior, in the said county, on this present 7th day of June, 1827, having upon view found, *or it having appeared to us*, that part of a public bridle road and public highway in the parish of Stoke Prior, in the said county of Worcester, commencing at or near certain buildings in the occupation of *William Turner*, called Owlet's Barn, near to the letter C. marked on to the plan hereunto annexed, and extending from such buildings across the bottom of a certain piece or parcel of pasture land, called the Fore-ground, belonging to *Thomas Collett*, Esq. Doctor of Medicine, in the occupation of the said *William Turner*, passing the letter D. in the said plan, and hence through and over other lands belonging to the said *Thomas Collett* to the letter E. on such plan, and thence through another piece of arable land, also belonging to the said *Thomas Collett*, in the occupation of the said *William Turner*, called the Turnip-field, to the point F. on such plan, and thence crossing a piece of meadow land also belonging to the said *Thomas Collett*, and in the occupation of the said *William Turner*, called the Far Meadow, to the letters F. F. on such plan, of the length of 811 yards or thereabouts, and of the breadth of 12 feet or

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thereabouts, is a useless and unnecessary public bridle road and public highway, do hereby order that the said part of the said bridle road and public highway henceforth be stopped up; and that the land and soil thereof shall be sold by the surveyors of the highways of the said parish of Stoke Prior to the said *Thomas Collett*, if he shall be willing to purchase the same, if not, to some other person or persons for the full value thereof, in pursuance of the statute in that case made and provided. Given under our hands and seals, the 7th day of June, A. D. 1827.

ASTON, (L. S.)
W. VERNON, (L. S.)"

This order was lodged with the clerk of the peace for the county of Worcester, at the July sessions, 1827, and was then confirmed and enrolled. Notice having been given in November, 1827 to the justices by whom the order was made, of the intention of the defendants to apply for a *certiorari* to remove this order, in Hilary Term the original order, and the order of sessions made in confirmation thereof, were removed accordingly into this Court. A rule *nisi* for quashing both orders for the insufficiency thereof having been obtained,

Taunton and *Shutt* now shewed cause. Two objections are taken to this order. First, that it does not make it appear that the magistrates acted upon their own view. Secondly, that it does not make it appear that the petty sessions were held within the district where the road lies. The order is not so formal as it ought to have been. It would have been better not to have put it in the alternative. It is clear what the justices meant to convey, namely, that they have viewed the road, otherwise the words, "upon view," would not have been found there. The word "or" appears to be used to connect the words "found and appeared" with the words "upon view;" merely transposing the participle. It makes no difference whether the words "upon view" precede or follow the participle. The words may be thus read:—

"Having upon view found, or it having appeared to us upon view necessary, &c." It is not necessary that the order should follow, verbatim, the words of the act; nor need it use words with the strictness of a pleader setting out the tenor of a libel. The distinction between orders and convictions is well known, *Rex* v. *Middlehurst* (*a*); and the Court will make every reasonable intendment in order to support the former. The Court will not intend that the magistrates decided upon other evidence without view. *Buller*, J. says, in *Rex* v. *Farringdon* (*b*), "Every thing is to be intended in favour of an order of justices." So again in *Rex* v. *Aire and Calder Navigation* (*c*), that learned judge says, "The distinction between orders of justices and special verdicts has been long established; in the latter, where it concludes generally, the whole case must appear upon the record; but *the very reverse* is the rule which obtains in the case of orders of justices; for the Court will intend every thing to be right which does not appear to be otherwise, and they will not entertain any doubt upon a subject upon which the justices did not." To appear, means to be evident to the senses. Upon the second point it was contended, that the word "limits," in 13 *Geo.* 3, c. 78, s. 61, meant those large districts, in respect of which separate commissions are issued, and would be here equivalent to "county." It was also urged, that as the petty sessions appear on the face of the order to have been held within the parish of Stoke Prior, where the road lay, the Court would not intend that parts of the parish lay within different divisions; and 8 East, 399, and a note of Sir W. D. Evans, in his edition of the Statutes, vol. vii. p. 383, were referred to.

Coltman contrà, was stopped by the Court.

BAYLEY, J.—This case is quite clear. The effect of the

(*a*) 1 Burr. 399.
(*b*) 2 T. R. 471.
(*c*) 2 T. R. 666.

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order is to take away from the public something which they before possessed. The magistrates have no jurisdiction but upon view; that must appear upon the face of the order; but here they do not say that they act upon view. For any thing that appears, the justices may never have seen the road. Instead of using the language of the statute, or any thing equivalent, they say they have done that *or something else.*

HOLROYD, J. and LITTLEDALE, J. concurred.

Orders quashed (*a*).

(*a*) And see *Rex* v *Pain*, 7 D. & R. 678; *Pain, exparte*, 5 B. & C. 251.

ATKINSON and others, Assignees of SHEDDON, a Bankrupt, *v.* BELL and others.

To support an action for goods bargained and sold, there must be either an actual sale of goods existing at the time of the contract, or a specific appropriation of goods afterwards, assented to by the buyer.

To support an action for work and labour, that on which the work is performed must be the property of the defendant.

ASSUMPSIT for goods bargained and sold, and for work, labour, and materials. Plea, the general issue, and issue thereon. At the trial before *Hullock*, B., at the Lancaster summer assizes 1827 (*a*), the case was this:—The plaintiffs were the assignees of the bankrupt *Sheddon*, who had been a manufacturer of machinery at Preston, in Lancashire. The defendants were flax-spinners at Whitehaven, in Cumberland. In November, 1825, the defendants, through the medium of a Mr. *Kaye*, who was the patentee of some improved machinery for spinning flax, applied to *Sheddon* to manufacture for them a roving frame and two spinning frames, upon the new construction. The roving frame was completed and delivered to the defendants, and the price of that being paid into Court, no question arose upon that. The spinning frames were commenced and proceeded with under

(*d*) Counsel for the plaintiffs, *Cross*, Serjt., and *Tomlinson*; for the defendants, *Brougham* and *Parke*.

the immediate superintendence of *Kaye*, who from time to time suggested alterations and improvements, which were adopted by *Sheddon*, and communicated to the defendants, who made no objection upon the subject. These alterations caused very considerable delay, and the frames were not eventually completed till May, 1826, when they were packed up ready for delivery, and a letter was sent to the defendants desiring their directions as to the mode in which they should be forwarded. The defendants then refused to receive the frames, and they consequently continued upon *Sheddon*'s premises until the following December, when they were accidentally destroyed by fire. Other frames had, in the interval between November, 1825, and May, 1826, been made by *Sheddon*, of the same nature and upon the same principle, for other parties, and delivered to them. Between May and December, 1826, *Sheddon* became a bankrupt. Upon this evidence two objections were taken for the defendants: first, in point of fact, that an unreasonable delay had taken place in executing the order, in consequence of which it had been countermanded; and secondly, in point of law, that as the declaration was framed, the action was not maintainable. The case first went to the jury upon the questions of fact, which they decided in favour of the plaintiffs, and it was then arranged that the verdict should be entered for the plaintiffs, with liberty for the defendants to move to enter a nonsuit upon the point of law: but the learned judge being afterwards pressed by the defendants' counsel, nonsuited the plaintiffs, giving them liberty to move to enter a verdict in their favour.

Cross, Serjt., in Michaelmas term last, moved accordingly, and obtained a rule *nisi*, against which,

Brougham and *Parke* shewed cause. The nonsuit was right. No action is maintainable, under the circumstances of this case, either for goods bargained and sold, or for

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work, labour and materials. First, in order to maintain assumpsit for goods bargained and sold, there must be a specific bargain for specific goods; and that bargain must have been so far acted upon, and every thing to be done under it so far completed, as to enable the purchaser to maintain trover for the goods upon tendering payment of their price. Here, there was no *such* bargain, for the goods were not in existence when the bargain was made; in fact there was *no* bargain; there was merely an order to make certain machines in a certain way. The particular machines for which it is sought to charge the defendants were never sold to them, nor accepted by them, nor did they ever even agree that they should be appropriated to them. So long as there is any uncertainty as to the goods, the contract is executory; and if the vendor is ready to deliver, but the purchaser refuses to receive, the proper remedy is an action upon the executory contract for such refusal. The whole, then, turns upon this simple question, "Did the property in the goods pass to the defendants?" If not, they are not liable in this form of action. Now, there are four modes of trying that question. The goods are destroyed by fire: upon whom is the loss to fall, the vendor or the purchaser? The vendor becomes bankrupt: can his assignees claim the goods as his property, or is the purchaser entitled to them as his property against the assignees? Suppose *Sheddon*, the vendor, had disposed of the goods to some third person: could the defendants have maintained trover for them against such third person? Suppose an execution had issued against the defendants: could the goods have been seized as their property under the execution? The result of all these inquiries is, that the contract remained executory, and that the property in the goods never passed to the defendants. *Sheddon* would have well performed his part of the contract by making and delivering to the defendants any other machines of the same species and quality. The general rule undoubtedly is, that a bargain and sale of goods passes the property in them to the purchaser; but

then it must be a bargain and sale of specific existing articles, which are at the time set apart for and appropriated to the purchaser. Where the bargain is for articles not in existence, or not seen by the purchaser, and which, therefore, cannot be so set apart and appropriated, there if the vendor afterwards delivers, or offers to deliver, articles conformable with the terms of the bargain, and the purchaser refuses to accept them, an action will lie; but it must be an action on the contract for not accepting, not an action of indebitatus assumpsit for goods bargained and sold, because though there was a *bargain* to support the one, there was no *sale* to support the other. This distinction will be found clearly laid down in many decided cases. In *Mucklow* v. *Mangles* (*a*), it was held, that the buyer of a chattel ordered to be made for him, acquires no property in the chattel until it is finished and delivered to him; and, therefore, before then, cannot maintain trover for it, even though he has paid the price before hand. That was upon the principle that the contract was executory. In *Simmons* v. *Swift* (*b*), the same principle was clearly and emphatically laid down. *Bayley*, J. said, "Generally speaking, where there is a bargain made for the purchase of goods, and nothing is said at the time about the delivery or the time of payment, the property in them vests immediately, so as to subject the buyer to all future risks, *provided nothing remains to be done on the part of the seller*, although, in that case, the buyer will not be entitled to take away the goods without payment of the price. If, however, any thing remains to be done on the part of the seller, till that act is done, the property does not vest in the buyer, so as to subject him to all risks. That rule is settled in a variety of cases." And *Holroyd*, J. said, "In the case of a *sale of specific goods* and chattels, where the quantity is ascertained or designated, it may be taken as a general position, that the property is altered by the sale, notwithstanding the

(*a*) 1 Taunt. 318.

(*b*) 8 D. & R. 693; 5 B. & C. 857, per nomen *Simmons* v. *Smith*.

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vendor is not bound to deliver until the price is paid, except where there is a stipulation for credit or payment at a future time, which would be inconsistent with the doctrine of lien; but in a case like the present, where *something remains to be done,* the property in the goods does not pass to the vendee, but continues in the vendor, and at his risk." Secondly, this action cannot be maintained upon the count for work, labour and materials. To sustain that count, the work and labour must be performed upon materials belonging to the defendant; here the materials upon which the work and labour were performed always belonged to *Sheddon.* The case of *Towers* v. *Osborne* (*a*) seems opposed to this argument, where *Pratt,* C. J. ruled that an action would lie for the value of a chariot, which the defendant bespoke and afterwards refused to take, though there was no written memorandum of the bargain and no earnest; being of opinion, that the case was not within the statute of frauds, which related only to contracts for actual sales, and not to executory contracts. But the authority of that case has been much doubted; and in *Garbutt* v. *Watson* (*b*) *Abbott,* C. J. referring to it said, "that undoubtedly is an extreme case, and goes to the utmost verge of the statute." A tailor who makes a coat for another, from cloth furnished by himself, cannot maintain an action for work and labour, if that other refuse to accept the coat when made, or if the coat be accidentally destroyed in making. The cause of action does not arise until the work and labour is finished, and the materials delivered; and that is a fatal objection to this action, whether the materials must belong to the purchaser or not. Besides, here, there was no contract for work and labour at all; it was a contract of sale, if it was any thing, and ought to have been so declared upon. They cited upon this point, *Hagedon* v. *Laing* (*c*), *Garbutt* v. *Watson* (*d*), and *Thompson* v. *Macirone* (*e*).

(*a*) 1 Stra. 506.

(*b*) 5 B. & A. 613; 1 D. & R. 219.

(*c*) 1 Marsh. 514; *S.C.* not *S.P.* 6 Taunt. 162.

(*d*) 5 B. & A. 613; 1 D. & R. 219.

(*e*) 4 D. & R. 619; 3 B. & C. 1.

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Cross, Serjt., and *Tomlinson*, contrà. If there was a specific appropriation of the goods to the defendants after they were finished, that will be sufficient to support each of the counts in this declaration; and it is submitted that there was such an appropriation. *Kaye* was the authorized agent of the defendants. He had full power to act as and for his principals throughout the whole transaction, and he did so; an appropriation by him, therefore, was an appropriation by the defendants. *Kaye* from time to time suggested alterations and improvements in the machines, during the progress of their manufacture; and those alterations and improvements were adopted by *Sheddon* and applied to the machines, and were made known to the defendants as the cause of delay in their completion, and not objected to by them. Such acts amounted to a selection and adoption of these identical machines for the defendants, and as their property; and then the transaction assumed the shape of an actual purchase and sale of specific goods, with directions from the purchaser to the vendor to effect some alterations and improvements in them. The cases cited on the other side do not militate against this line of argument. With respect to *Simmons* v. *Swift*, and *Thompson* v. *Macirone*, they may be dismissed with the single observation that they were actions for goods sold and *delivered*, and that they have, therefore, really no bearing upon the present case, in which it is not pretended that there was any delivery of the machines. The extent of the decision in *Mucklow* v. *Mangles* seems to have been somewhat qualified by the judgment of this Court in *Woods* v. *Russell* (*a*). Now the latter case in principle governs the present, for though not strictly analogous, they both involve and illustrate the same principle, namely, that any specific appropriation of the goods by and to the purchaser, vests the property *eo instanti* in him. *Kaye*'s interposition, as the agent of the defendants, forms an answer to all the arguments on the other side. It is said, *Sheddon* might have

(*a*) 5 B. & A. 942; 1 D. & R. 587.

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disposed of these machines to third persons, and have appropriated others to the defendants. How could he do so, when these very machines were undergoing alterations, at the suggestion and under the superintendence of *Kaye*? Again, it is said the machines were the property of *Sheddon*, and might have been taken by the sheriff under an execution, or by his assignees under a commission of bankruptcy against him. But as *Sheddon* himself could not have sold them without the concurrence of *Kaye*, so, being protected by the patent, neither an execution nor a commission could have taken them without his concurrence also. Being articles manufactured under the privileges of a patent belonging to *Kaye*, *Sheddon*, under any circumstances, could have had but a very qualified property in these machines; and a much slighter act of selection and appropriation on the part of *Kaye* would suffice to vest the property in them in his principals, than in cases of goods of an ordinary nature. Now in *Rhode* v. *Thwaites* (*a*), the mere selection of the goods by the seller, and appropriation of them by him to the buyer, was held to pass the property, and to support an action for goods bargained and sold. [*Bayley*, J. Yes, *because* that selection and appropriation were known to the buyer, and assented to by him. But, even assuming such an appropriation here by *Sheddon*, what evidence is there that the defendants ever assented to it? That is the difficulty in this case.] Then, secondly, there is another view of the case in which the count for work and labour seems sustainable. Where a chattel is ordered, which but for that order would never have been in existence at all, the mere order is *per se* an appropriation of the chattel to and by, and vests the property in it in, the orderer; and, when the chattel is completed, the manufacturer has a right to sue the orderer for work and labour and materials. *Menetone* v. *Athawes* (*b*), where it was held, that an action lay by a shipwright for work and labour done, and materials furnished, in repairing a ship, though

(*a*) 6 B. & C. 388. (*b*) 3 Burr. 1592.

burned in dock before the repairs were complete, and *Towers* v. *Osborne*, already cited, and in reference to which, *Lawrence*, J., said, in *Cooper* v. *Elston* (*a*), "the case, when truly considered, was not a contract for the purchase of goods, but for the making of something which had not any existence at the time;" and *Grose*, J., (*b*) "the case went upon the general principle, that executory contracts were not within the meaning of the statute" (of frauds). If by that were meant contracts for the sale of goods to be executed on a future day, such a construction would be a repeal of the act; but if it only meant such contracts as were incapable of being executed at the time, then the decision was right; and such was the case then in judgment. Again, in *Garbutt* v. *Watson*, *Abbott*, C. J., alluding to that case, said, "that was the case of a person ordering a chariot to be made for him, and but for that order it might never have been made. It did not exist at the time the order was given, and but for the order it might never have existed;" and he appears to have relied upon that as distinguishing that case from cases of general sales. That case, therefore, though it may be an extreme one, has certainly never been overruled. If the work and labour must be performed on the materials of the defendant, in order to support the action, it was so here; for the patent and invention of the machines existed as the property of *Kaye*, and therefore of his principals the defendants, and was merely worked into perfect shape by the labour of *Sheddon*.

BAYLEY, J.—Upon the facts proved in this case I am of opinion, that if the plaintiffs had declared against the defendants for a breach of contract in not accepting the goods, they might have recovered; and that upon payment of costs they ought to be permitted to add such a count to their declaration, and to have a new trial. But, framed as their declaration at present is, containing only counts for goods bargained and sold, and for work, labour, and mate-

(*a*) 7 T. R. 17. (*b*) Id. 16.

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rials, I think, upon the evidence in the case, that the property in the goods never vested in the defendants, so as to cast upon them the burthen of bearing the loss of the goods, and to entitle the plaintiffs to recover the value. Where goods are destroyed by fire, the loss must fall upon the party in whom the property in such goods is vested at the time of the accident: if the property in the goods has been transferred to the party by whom they were ordered, and for whom they were made, the loss must fall on him; if not, it must fall on the maker. It has been very powerfully argued by Mr. *Tomlinson*, that in this case there was such a specific appropriation of the goods to the defendants as sufficed to vest the property in them; but I am not convinced by his reasoning upon the subject. While goods that have been ordered by a particular individual are in a course of manufacture, the materials remain the property of the manufacturer; no title to them vests in the buyer, until the goods are completed. Even when they are completed, the manufacturer may, at the peril of an action, deliver them to a third person. In some cases he may be justified in so doing. Suppose he manufactures goods pursuant to order, which are to be paid for at a certain credit from their completion, and when the goods are completed, and before they are delivered, he has reason to doubt the solvency of the orderer: in such a case, I apprehend, he would be clearly entitled to sell and deliver the goods to a third person, and would be capable of conferring upon the new vendee a perfect title to the possession of them. It was in evidence, that while these machines were in a course of manufacture, they were from time to time seen by *Kaye*, the defendant's agent; but that does not appear to me to vary the case. Neither do I feel my mind at all seriously impressed by the argument that the machines were manufactured under a patent; because it is conceded that, with *Kaye*'s concurrence, they might have been sold to any other person. I think the case of *Woods* v. *Russell*, which was much relied on for the plaintiffs, is a

very different case from this. There the price of the ship was to be paid by four instalments, two to be paid in the progress of the work, and the other two when the ship was launched. The ground of the decision there was, that the first two instalments had been actually paid; and any other decision would have been most unjust; because the buyer having paid his money, the ship, *pro tanto*, became his property; and the case was in effect a purchase of the materials of the ship, and a part payment of the price for them, by which the property in them clearly passed to the purchaser. Suppose, in the present case, that an execution had issued against the goods of *Sheddon*, could these machines have been seized under it or not? I have no doubt that they might, for I think they always continued to be *Sheddon*'s property. No doubt they were intended for the defendants, and were in *Sheddon*'s mind specifically appropriated to them; but they never assented to that appropriation, and till they did, it could not make the goods their property. If there had been such an assent, the case of *Rhode* v. *Thwaites* would have applied; but in that respect the cases differ. It was contended, that in an early stage of the transaction, *Kaye*, by his conduct, had signified the assent of the defendants to the appropriation; but I do not think his acts amounted to that, nor, if they had, would they, in my opinion, have been binding on the defendants. For these reasons I am of opinion that the count for goods bargained and sold cannot be sustained. Then do the plaintiffs stand in any better situation on their count for work, labour, and materials? I think not. In order to sustain that action, the materials upon which the work and labour are performed must be the property of the employer. If a man, by my order, works on my land, or my house, or my furniture, it is my work, and I am at once liable to pay for it. But here *Sheddon* was working upon his own materials, and the contract between him and the defendants was properly a contract for the sale of goods, and not for work and labour. In a contract for work and labour, the right of action does not accrue until

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the work is finished, and then the claim would properly be for goods sold and delivered. The present action, then, is not maintainable, but, upon the terms already mentioned, the plaintiffs may add a count for goods sold and delivered to their declaration, and proceed to a new trial. I would add, that this permission to amend is granted solely on account of the hardship of the case, and must not be drawn into a precedent.

HOLROYD, J.—I think the plaintiffs would have been entitled to a verdict, if their declaration had contained a count for not accepting the machinery. I have entertained considerable doubt whether the present action is not maintainable upon the count for goods bargained and sold. Upon deliberation, however, I incline to think it is not; because the appropriation of the goods by *Sheddon* to the defendants never having been assented to by them, was not such an appropriation as would by law vest the property in the goods in them. I also doubted for some time whether, as the machines were ordered by the defendants, the work performed upon them was not work and labour done for them, so as to sustain the second count in the declaration. But I am now satisfied that as the materials were found by *Sheddon*, and were originally his property, they continued to be so until the work should be entirely finished, and the goods delivered to the defendants. Upon both points, therefore, I concur in thinking that the present action cannot be sustained.

LITTLEDALE, J.—In order to support an action for goods bargained and sold, there must be an actual sale; and in order to support an averment of an actual sale, there must be proof of the buyer's assent to take the particular goods alleged to have been sold to him. There was no proof of any such assent here, and upon that short ground I think the count for goods bargained and sold cannot be sustained. To sustain that count, it must appear that the property passed to the buyer, which it never did here.

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Sheddon might have sold those particular machines to a third person, and the defendants could not have maintained an action of trover against such third person for refusing to deliver them up. *Sheddon* might have delivered any other machines, if equally good and conformable to order, to the defendants, as well as these; and that would have been a good performance of his contract. These machines would have been liable under an execution or a commission of bankruptcy against *Sheddon*, and the loss would have fallen upon him if they had been burned. With respect to the other count, the materials were found, and the work and labour bestowed upon them, by *Sheddon*, for the purpose of ultimately, and at some future time, effecting a sale; therefore that count cannot be supported. The materials were never the property of the defendants, for the work to be performed upon them was never complete. The contract was executory, not executed, and no right of action had arisen out of it.

Rule absolute, on the terms suggested by *Bayley*, J. (*a*)

(*a*) See Manning's N. P. Digest, 2d edition, 369, 370, and the notes there.

THOMAS ROYSE MORGELL, and Lady MARY his Wife, *v.* PAUL.

No tenancy can be *implied* under a party who has not the legal estate.

Where *A.* is seised in trust for *B.* and *C.*, neither *B.* nor *C.* can maintain use and occupation, &c. in his own name against the tenant as principal, treating *A.* as his agent.

ASSUMPSIT for the use and occupation of a farm; for damages arising from breaches of good husbandry, non-repairs, and dilapidations, and various acts of alleged misconduct; for 880*l.*, arrears of rent due 11th October, 1822; and for 2,280*l.*, arrears of rent from 11th October, 1822, to 11th October, 1825. Plea, non assumpsit; and issue thereon (*a*). At the trial before *Alexander*, C. B., at the Norfolk summer assizes, 1827, the case was this:—The

(*a*) The declaration contained many very special counts, but as the single point decided by the Court turned upon the right of these plaintiffs to bring the action, wholly independently of the form of the action, it is not deemed necessary to set them forth.

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plaintiff, Lady *Mary Morgell*, had been the widow of *Charles Balders*, esquire, who had been tenant for life of the premises occupied by the defendant, and was interested in those premises under a marriage settlement, in the manner hereafter described. The defendant was a farmer, who had occupied the premises in question from Michaelmas, 1813, to Michaelmas, 1824, under a certain lease or agreement hereafter described. *John Balders*, esquire, who was seised in fee of the premises, by will dated 4th of February, 1787, devised them to *Edmund Walker*, his executors, &c., for the term of 500 years, and subject thereto, and to certain annuities, one of which was still subsisting, to his son *Charles Balders*, and his assigns, for life, remainder to trustees to support contingent remainders, remainder to the first and other sons of *Charles Balders* in tail male, remainder over. The trusts of the term for 500 years were, to receive the rents till the tenant for life should attain 30 years, and thereout to pay the annuities given by the will; and after payment thereof, and of all repairs and taxes, to pay 100*l.* a year to the tenant for life till he should attain 21 years, and afterwards a further 100*l.* a year till he should attain 30 years; if the testator died before his daughter attained 21 years, to pay her 100*l.* a year out of the rents till she should attain 21 years, and then by demise, sale, or mortgage, to raise 3000*l.* for her; and after payment of such annuities and charges, and the interest of the 3000*l.*, to place the residue of the net surplus arising from the rents out at interest till the tenant for life should attain 30 years, to the intent to raise a further 2000*l.* for his daughter, and to raise any deficiency of that 2000*l.* by further demise, sale, or mortgage, if necessary. The will then gave a power to grant leases, and to jointure a wife, (with a proviso for cesser of the term,) first to *Walker* till the tenant for life should attain 30 years, and afterwards to the tenant for life. Upon the marriage of the tenant for life with the plaintiff Lady *Mary*, in 1803, the premises were demised by their marriage settlement to trustees for a term

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of 99 years, if the tenant for life should so long live, upon trust to raise and pay the wife 300*l.* a year during the joint lives of the husband and wife; and the tenant for life under the power contained in the will, limited, appointed, and assured the premises after his death to his wife for life, subject to the terms of 99 years and 500 years, and to the leasing power contained in the will. The tenant for life, *Charles Balders*, continued in possession of the premises until the year 1813, when the defendant went into possession of them under an agreement for a lease made between them for a term of 11 years. In February, 1814, the defendant executed an attornment of tenancy to the trustees under the marriage settlement, and continued from that time to pay the rent to them. Certain annuity creditors of the tenant for life applied to the defendant to pay the rent to them, and instituted a suit in Chancery against the trustees under the marriage settlement for that purpose, who thereupon gave the defendant a bond of indemnity, and he still continued to pay the rent to them. The tenant for life died in November 1819, when his widow, the plaintiff, Lady *Mary*, became seised of the legal estate for her life, but she never received any rent from the defendant, or in any way interfered in the management of the premises. In October, 1822, the defendant becoming in arrear with his rent, the trustees under the marriage settlement distrained upon the premises; upon which an agreement was entered into between those parties, that a sum of 1832*l.* 14*s.* 8*d.* should be accepted in satisfaction of the arrears of rent, and of the half-year's rent due at Michaelmas, 1822, and the future rent should be reduced from 1900*l.* to 1140*l.* a year; with a proviso, that in case of any future breach of the stipulations in the original agreement, the trustees might proceed for the same, and for the whole of the arrears of rent, and for the future rent of 1900*l.*, the same as if this new agreement had not been made. The plaintiffs married on the 7th of August, 1825. The defendant continued in the occupation of the premises, and

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paid the rent to the trustees according to the last agreement, down to Michaelmas, 1824, when he quitted: in the receipt for the last payment of rent the trustees stipulated that the same should not prejudice any claim for breach of covenant. A vast deal of correspondence was put in and read, from which it appeared, that previously to the trustees under the marriage settlement entering into the agreement for reducing the rent, they consulted Lady *Mary*, and "other persons;" and that Lady *Mary* perfectly well knew that the defendant paid the rent to her trustees, she having constantly received it from them, and having repeatedly written to the defendant, pressing him for payment, and stating, that in case of his default she should look to her trustees. There was contradictory evidence as to the state of the farm when surrendered by the defendant. It was objected on the part of the defendant, that, under these circumstances, the only existing relation of landlord and tenant, to bind the defendant, had been between him and Lady *Mary*'s trustees, and that such relation had never existed between him and Lady *Mary*, so as to entitle her to maintain this action; or, at all events, that the agreement having been entered into by the trustees, the attornment having been made to them, and the rent having been always paid to them, as the agent of Lady *Mary*, and with her knowledge and consent, she was bound by his acts, and could not sue in her own name for any by-gone breach of covenant, but only in the names of her trustees. The learned Judge thought the objection well founded, and the plaintiff consequently was nonsuited. In Michaelmas term last a rule *nisi* for setting aside the nonsuit, and for a new trial, was obtained; against which,

F. Kelly and *Gunning* shewed cause. This action being founded on the agreement of October, 1813, which was made between the defendant and the deceased tenant for life, cannot be maintained by Lady *Mary*. *Balders*, the tenant for life, had the legal reversion in the freehold, sub-

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ject to the two terms for 500 and 99 years. Upon his marriage with Lady *Mary* in 1803, he demised the estate to trustees, for a term of 99 years, if he should so long live, and appointed it after his death to Lady *Mary* for life, subject also to the two terms of 500 and 99 years, and to his leasing power. In 1813 he leased the estate to the defendant for a term of 11 years. In 1814, *Balders* having quitted England insolvent, the defendant attorned to Lady *Mary*'s trustees, who then assumed, and ever after continued, the entire management of the estate. In 1819 *Balders* died; and the first question is, to whom the legal estate passed at his death. Lady *Mary* did not assume it, and she was perfectly well acquainted with the relative situation and dealings of the defendant and her trustees. The result of those dealings and that situation was, that those parties acted completely as landlord and tenant, and therefore that Lady *Mary* cannot sue in her own name a person who was not her tenant, upon an agreement to which she was not a party. [*Bayley*, J. Not for the rent, perhaps, because payments of rent to her trustees were payments to her; but surely she may sue for a breach of the agreement in mismanaging the farm.] That is, in fact, the first question in the case. To hold that she can do so, will produce great hardship and inconvenience to the tenant, at least where the action is for a by-gone breach. For the future, after notice to the tenant that she was his landlady, she might no doubt have maintained such an action, but not, it is submitted, under circumstances like these, for the past. [*Bayley*, J. Is she precluded from suing even for rent? Supposing there was rent now in arrear, could she not sue the defendant for it, and compel him to pay it to her, instead of her trustees? *à fortiori*, may she not sue him for dilapidations?] It is submitted not, because she has never given him notice he was *her* tenant. The commencement of the action cannot be deemed such a notice in a case like this. The principle acted upon in cases of mortgagor and mortgagee, with

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respect to notice, applies to this case, namely, that a mortgagee may recover in ejectment, without giving notice to quit, against a tenant who claims under a lease from the mortgagor, granted after the mortgage, *without the privity of the mortgagee; Keech* v. *Hall* (*a*); but that where there is tenant from year to year, and the landlord mortgages pending the year, the tenant is entitled to six months' notice from the mortgagee, *Birch* v. *Wright* (*b*); the principle being, that where the mortgagee is privy to the tenancy, he cannot eject the tenant. If the plaintiff in this case can recover, the effect will be to render the defendant liable to two landlords, which would be most unjust. [*Bayley*, J. There are many instances in which a tenant may safely deal with two parties as principal and agent.] But not as landlords, both of them. Suppose two give him separate notices to quit, which is he to obey? Suppose, in this case, Lady *Mary* had given the defendant notice to quit during the agreement, he could not safely have acted upon it. [*Bayley*, J. What injury can we do the defendant, by holding that Lady *Mary* may sue him for dilapidations? If there are dilapidations, he clearly ought to pay some one for them, and what injury can it do him to pay *her*?] He may still be liable to her trustees; there is no express tenancy between him and her, nor are there sufficient grounds to raise the presumption of an implied tenancy. If there was not an implied tenancy from the defendant to Lady *Mary*, she clearly cannot sue; and it is submitted that she had not such an estate in the premises as is necessary to create an implied tenancy. The term for 500 years is still outstanding; the legal estate, therefore, is still in the trustees of that term, or their assignees, and they have the legal right of present possession. The defendant having been in possession during the life and under the demise of her husband, the tenant for life, Lady *Mary* could not at his death have turned the defendant out of possession. The outstanding term would have been an

(*a*) 1 Doug. 21. (*b*) 1 T. R. 378.

answer to a demise by her in an action of ejectment. Then if she could not have maintained ejectment against him, he was not her tenant, and then she cannot maintain this action. On the other hand, if the trustee of the outstanding term had brought an action of ejectment against the defendant, the defendant could have had no defence, nor could Lady *Mary* have furnished him with any, for there was no privity either of estate or of contract between them. Where there is no express tenancy, a tenancy can be implied only in favour of the party who has the legal estate. *Lumley* v. *Hodgson* (*a*).

Storks, Serjt., and *Parke*, contrà, were desired by the Court to confine themselves to the second point of the implied tenancy. If the argument on the other side is good at all, it is good for all lengths, and then the right of Lady *Mary*'s trustees to sue is gone equally with her own. The defendant was in possession as tenant to *Balders*, the tenant for life, and the husband of Lady *Mary*. Upon the death of *Balders*, the defendant attorned to Lady *Mary*'s trustees. He cannot now gainsay either his tenancy to the one, or his attornment to the other. The term for 99 years was clearly gone, and till that happened there must have been a tenancy either to Lady *Mary*, or to her trustees. Her trustees might undoubtedly have maintained this action. But they were only her agents, and the defendant, in recognizing them as such, has also recognized her as their principal, and as his own landlady. When *Balders* died, the interest of Lady *Mary*'s trustees determined, and the whole interest passed to Lady *Mary* herself. [*Bayley*, J. That is assuming the whole question. She had *an* interest; but had not the surviving trustee of the 500 years' term, or some one claiming under him, an interest also?] As far as the mere question of agency goes, Lady *Mary* may clearly maintain the action. Then whose agents are her trustees in point of law to be considered,

(*a*) 16 East, 99.

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when they entered into the new agreement with the defendant? It is submitted that they then acted exclusively as the agents of Lady *Mary*, and if so, the question is, not in whom the legal estate was then vested, but for whom that contract was made. The only question is, was there a contract, express or implied, between the plaintiff and the defendant, for the use and occupation of the premises; for if there was, the plaintiff may maintain this action, *Hull* v. *Vaughan* (*a*). It is submitted that there was such a contract, impliedly at least; and that after the death of *Balders*, Lady *Mary*'s trustees acted as *her* agents exclusively and solely. What is there in the case to shew that they acted as agents for any other person? Nothing. The 500 years' term was never, upon the evidence, out of the trustees of that term. They could only raise the money which they had to raise by mortgage, or by themselves receiving the rents. They had no power to assign the term, or to depute to any other person the receipt of the rents. There was no proof that they ever did either in point of fact, and it is clear that they had no right to do either in point of law. [*Bayley*, J. Might they not have sued Lady *Mary*'s trustees for the rents received by them?] No; because Lady *Mary*'s trustees cannot be considered as the agents of or for the trustees of the 500 years' term. There are no facts in the case from which to draw such a conclusion. The 500 years' term was nothing more than an outstanding mortgage. [*Bayley*, J. Of the subsistence of which, it must be remembered, Lady *Mary*'s trustees had notice.] There was no connection between them and the other trustees, all their connection was with the plaintiff. When *Balders* died, the trustees under the 500 years' term had no longer any interest, though they erroneously supposed they had. The bond of indemnity given by Lady *Mary*'s trustees to the defendant, has no reference to the 500 years' term. [*Holroyd*, J. The condition mentions the trustees of that term.] But Lady *Mary*'s trustees referred

(*a*) 6 Price, 157.

their interference and management exclusively to her interest under the 99 years' term. How can the Court infer that they were demising as the agent of some third person, as well as her? If there was any doubt upon that point, that question should have been left to the jury; for at any rate there were facts both ways, and it is a question of fact as well as of law. At all events, therefore, the nonsuit was wrong, and the plaintiff is entitled to have a new trial.

BAYLEY, J.—I am of opinion that the nonsuit was right. It proceeded upon what I consider to have been properly a question of law for the decision of the learned Judge; and I think his decision upon that question was correct. The facts of the case appear at first sight somewhat complicated, but when rightly understood they lie in a very narrow compass, and are, if I rightly understand them, these. By the will of *Balders* the father, the estate in question was devised to *Walker* for a term of 500 years, in trust, to raise a sum of 5000*l.* for certain purposes, and then to his son, the husband of the plaintiff, for life, with power to settle it in the way of jointure upon his wife, and to grant leases, determinable with his life. *Balders*, the tenant for life, upon his marriage with the plaintiff in 1803, settled the estate on her, by vesting it in trustees for a term of 99 years, determinable at his own death or that of his wife, the settlement reciting his father's will, and noticing the prior charges upon the estate. The plaintiff's trustees, therefore, from the first, knew of the existence of the 500 years' term. In 1813, *Balders*, the tenant for life, who had been receiving the rents, and probably paying interest upon the 5000*l.*, demised the estate to the defendant. The lease was determinable at his (*Balders's*) death. In 1814 he went abroad, and the tenant then attorned to the plaintiff's trustees, who from that time became ostensibly the landlords and managers of the estate. In 1819, he tenant for life died. Now the legal consequence of his

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death was, that the term for 99 years, the term of the plaintiff's trustees, ceased as well as the lease; and that the tenancy created by the attornment ceased also. Then the parties legally interested in the estate were, first, the trustee under the 500 years' term, and next the plaintiff. The plaintiff's trustees, however, thinking that their term was still alive, went on to receive the rents. Now they were clearly responsible for those rents to the trustee of the 500 years' term, unless there had been an agreement between them limiting or waiving their responsibility, which there was not. They were interested, therefore, in several ways; to protect themselves, to protect the plaintiff, and to protect those who might claim under the outstanding term. If they had still continued trustees for the plaintiff only, and had been still her agents, and her's only, the plaintiff would have had a right at any time to come forward as a principal and to sue the tenant for any breach of his agreement of which he might be guilty. But they were not so; the plaintiff was principally, no doubt, but not solely interested in the estate; and her trustees were acting, by construction of law, not for her only, but for all the other parties who were interested also. She, therefore, had no such interest as entitled her to sue, but her trustees had; and though this action in her name cannot be supported, it may be supported if brought in the names of her trustees.

HOLROYD, J.—This action is brought upon a supposed contract between the plaintiff and the defendant. In point of fact no contract ever existed between them. It has been argued, that the contract made between her trustees and the defendant gave the plaintiff a right of action. In point of law it did no such thing. Her trustees were expressly, and in the legal sense of the word, the landlords of the defendant for a certain time, namely, until the death of *Balders*, the tenant for life; and they thought that they continued so afterwards, but in that they were mistaken.

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LITTLEDALE, J.—The interest of the plaintiff's trustees, as trustees, ceased entirely at the death of *Balders*, the tenant for life. From that time they were mere strangers. They, however, entered into a new contract, under which they acted, in fact as trustees, but in law as agents only. And as agents for whom? For the plaintiff principally, but not solely; for her, *and* for the claimants under the outstanding term: that was evidenced by their own conduct; for it appears that before they made the agreement for reducing the rent, they consulted, not the plaintiff only, but "other persons;" that is, for it can mean no other, the other persons interested in the estate. They were acting then, whether as agents or trustees, not for the plaintiff, but for the estate; for all who had any interest in it. The plaintiff was not the person solely interested, and therefore she cannot maintain this action.

Rule discharged.

CUCKSON *v.* WINTER and others.

DECLARATION in case. The first count was for an excessive distress. The second for non-delivery of a notice of distress and an inventory of the goods. The third for not having duly appraised the goods. And the last in trover for the goods. Plea, not guilty, and issue thereon. At the trial before *Alexander*, C. B., at the last Lent assizes for the county of Lincoln, the first three counts were abandoned, and the only struggle was for a verdict on the count in trover. It appeared that while the defendants were in possession of the goods under the distress, and just as they were preparing to sell them, the sheriff's precept for the restoration of the goods to the plaintiff, who had replevied them, was brought to the house and served upon the defendants by a person who was not of the full age of 21 years, and who was not a regular bailiff or sheriff's officer.

The sale of goods under a distress, after service of an *irregular* notice of replevy, without removing the goods off the premises, is not a conversion.

Service of a notice of replevy by an infant, is illegal and void.

Semble, that an infant cannot be a bailiff or sheriff's officer.

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This precept, and the service of it, the defendants treated as a nullity, and proceeded to sell the goods; but none of the goods were removed from off the plaintiff's premises, and they were all finally restored to him under an arrangement for that purpose. Upon this evidence the Lord Chief Baron was of opinion that the conduct of the defendants did not amount to a conversion of the goods, so as to support the count in trover, and accordingly directed the jury to find their verdict generally for the defendants, which they did. In last term a rule *nisi* was obtained for setting aside that verdict, and for a new trial; against which,

Denman, C. S. and *N. R. Clarke*, shewed cause. The question for the consideration of the Court arises upon the fourth count of the declaration only, the count for trover; and the rule has been obtained upon the suggestion that the defendants had been guilty of a conversion of the plaintiff's goods, such as would support that count. It is, however, confidently submitted that there was no conversion in this case. *Baldwin* v. *Cole* (*a*), and *M'Combie* v. *Davies* (*b*), were cited when the rule was moved for, but neither of them applies to this case. In the former, Lord *Holt* is reported to have said, "assuming to one's self the property and right of disposing of another man's goods, is a conversion;" and that definition has, it was said, been recognized in modern times by Lord *Ellenborough* (*c*). But the present defendants cannot be said to have "*assumed*" the property and right of disposing of the plaintiff's goods, because they had possession of them under legal process; and even if their right to such possession was superseded by subsequent legal process, which it was not, because that subsequent process was irregular, still they were not guilty of any act of conversion, because they did not after that remove the goods. In *M'Combie* v. *Davies*, the defendant brought himself clearly within Lord *Holt*'s defini-

(*a*) 6 Mod. 221.
(*b*) 6 East, 538.
(*c*) In *M'Combie* v. *Davies*, 6 East, 540.

tion, because he refused to deliver up the goods after he knew that the broker, of whom he had received them, had pledged them without the authority of their real owner. In this case the goods were never removed from off the plaintiff's premises, and were eventually given up to him. [*Bayley*, J. The defendants went on with the sale after the replevy came.] The mere act of selling was not a conversion, because it was not followed up by a removal of the goods; and there was no other act of conversion after the replevy, for there was no demand and refusal after that time. Besides, the replevy itself was illegal, being served by a person who was a minor; therefore the precept, in point of law, was never executed, and the defendants were as much justified in selling after the replevy as before. Service of a replevy by a minor is clearly illegal. The party serving it ought to be a bailiff, and the office of bailiff cannot be held by a minor. The office, in this instance, was one involving a public trust; for the bailiff is to take the goods which are replevied into his possession as the representative of the sheriff, and to be accountable for them afterwards either to the distrainor or the original owner. This case, therefore, comes within the principle of *Claridge* v. *Favyn* (*a*), where it was decided by this Court that an infant could not be appointed to the office of clerk of a Court of Requests, where it was part of the duty of the office for the clerk to receive the money of the suitors, because it was in the nature of an office of public trust (*b*). Neither can the office of bailiff be executed by deputy (*c*);

(*a*) 5 B. & A. 81.

(*b*) An infant cannot be an attorney, *bailiff*, factor, or receiver. F. N. B. 118; 1 Rol. Abr. 117; Co. Litt. 172; Cro. Eliz. 637.

(*c*) There does not appear to be any express decision upon the question whether a sheriff's bailiff can appoint a deputy or not. Upon principle, it should seem that he cannot, for a sheriff's bailiff is not an officer of the Court, but only the sheriff himself, Reg. Gen. K. B. 23 Car. 1; and the arrest of the sheriff's bailiff is the arrest of the sheriff, Co. Litt. 61, 168; and all actions for breach of duty must be brought against the sheriff, though the default be the bailiff's, *Cameron* v. *Reynolds*,

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if it could, this objection, perhaps, would fail; but it seems clear that it could not. Would an arrest, for instance, by a person acting as a bailiff, but not in reality being one, be good? Clearly not(*a*). Neither, upon the same principle, was the service of the replevy by a person, who being a minor could not legally be a bailiff, good; and then if there was no replevy, there was clearly no conversion, of the goods.

Clinton, contrà. The count in trover is maintainable, for there was a clear conversion of the goods within the principle of all the cases cited. The warrant for replevying the goods was shewn to the defendants, and they persisted, notwithstanding, in going on and selling. That was a conversion, although the goods were not removed, for it was "assuming to themselves the right of disposing of the goods;" and it was not purged by the subsequent restoration of the goods to the plaintiff. In *M'Combie* v. *Davies* the tobacco was never removed, and yet the defendant's acts there were held to amount to a conversion. With respect to the infancy of the bailiff, there is no weight in that objection; for even if the service of the warrant was irregular, still, as the goods had in fact been replevied, and that circumstance was known to the defendants, they were

Cowper, 403. But the bailiff of a liberty is an officer which the Court takes notice of; and may make a deputy; *Kent* v. *Elwis*, Cro. Jac. 242. A constable also may make a deputy. *Rex* v. *Clarke*, 1 T. R. 679; *Rex* v. *Wood*, 1 Esp. N. P. C. 359; *Underhill* v. *Witts*, 3 Esp. N. P. C. 56. In *Jacob's Law Dict.* tit. *Deputy*, it is said that "a man cannot make his deputy in all cases, except the grant of the office justify him in it, and where it is to one to execute by deputy." But a sheriff may make a deputy or under-sheriff, although he have not such express words in his patent. 9 Co. Rep. 49.

(*a*) In *Housin* v. *Barrow*, 6 T. R. 122, the sheriff having directed a warrant to *A.* and all his other officers to arrest *B.*, *A.* afterwards inserted the name of *C.*; and it was held that the warrant was illegal, and the arrest by *C.* void. In *Boyd* v. *Durand*, 2 Taunt. 161, it was held that a warrant to four jointly, and not separately, would clearly not authorize an arrest by one.

equally guilty of a conversion. But *Claridge* v. *Favyn* is no authority for saying that the service of the warrant was irregular. The two cases are wholly dissimilar. The office in that case was one of a permanent nature, and involving an important pecuniary trust; here the service of the warrant was a mere temporary act, involving no responsibility.

BAYLEY, J.—The bailiff who serves the warrant in a case of replevin, is authorized to take possession of the goods, and is responsible for their safe delivery to the party who shall ultimately appear entitled to them. His office, therefore, is one of responsibility and trust, unfit to be performed by an infant, and it was highly improper of the sheriff or his bailiff to entrust the execution of the warrant to such a person. It seems to me, therefore, that there was no conversion in this case, upon two grounds: first, because the service of the warrant was illegal; and secondly, because the goods, though sold, were never removed, but were ultimately left in the possession of the plaintiff. I am therefore of opinion that this rule must be discharged.

HOLROYD, J.—I am of the same opinion. The sale was clearly no conversion, if the service of the warrant was illegal, which I think it certainly was.

LITTLEDALE, J., concurred.

Rule discharged.

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BRYAN *v.* WHISTLER, Clerk.

A grant by a rector to an individual of the exclusive right of burial for himself, his family, and friends, in a vault under the church, is a grant of an easement arising out of land, and cannot be made *by parol*.

No action will lie for the disturbance of such a right against a rector; if it would, *case*, and not *trespass*, would be the proper form.

Semble, that a rector has no power to make such a grant, *even by deed*.

DECLARATION in *case*. The first count stated that defendant, before and at the time of committing the grievance, &c., was and still is rector of the rectory and parish church at St. Clement, Hastings, in the county of Sussex: that plaintiff being desirous to bury one *Mary Ann Williams* in a vault in the said church, heretofore, to wit, on &c., at &c., applied to defendant, as such rector, for permission to make a vault in the said church, for the purpose of burying the dead body of the said *M. A. W.* therein, and to put up a tablet or monument near to the said vault, to perpetuate the same: that defendant as such rector, in consideration of the sum of 20*l.* to be paid to him for such permission, consented and agreed that plaintiff should have permission to make such vault and to put up such tablet or monument, and should have the sole and exclusive use of such vault upon being paid the sum of 20*l.*, and one guinea for the service: that plaintiff did at his expense make and cause to be made such vault in the said church, and did cause the dead body of the said *M. A. W.* to be buried therein; and did at his expense put up a tablet or monument near to the same vault to perpetuate the same, and did pay to defendant as such rector the sum of 20*l.* for such permission, and the sum of one guinea for the service; which sums defendant, as such rector, accepted of plaintiff: Yet defendant well knowing &c., but contriving &c., to deprive plaintiff of the exclusive use and benefit of the said vault and right of interment therein, and to disturb the remains of the said *M. A. W.*, afterwards, to wit, on &c., at &c., wrongfully and injuriously broke into, dug into, pulled up and damaged the said vault, and caused and procured &c., and wrongfully and injuriously, without the leave or license and against the will of plaintiff, opened and caused the said vault to be opened, and interred and caused to be interred the dead body of another person in the same

vault: By means whereof plaintiff has lost and been deprived of the benefit and advantage of the said vault or monument and tablet, and was disturbed and injured in the said exclusive right of interment in such vault or monument, &c. The second count stated, as before, that defendant was rector; that plaintiff being desirous to bury the said *M. A. W.* in a vault in the said church, and that the said vault should be exclusively appropriated to and for the use of plaintiff and his family and friends, applied to defendant, as such rector, for permission to make a vault in the said church, to be so exclusively appropriated, and to put up a tablet or monument near to the said vault: that defendant, as such rector, consented and agreed that plaintiff should have permission to make such vault and to put up such tablet or monument, having the exclusive use thereof, upon being paid the sum of 20*l.*, and one guinea for the service: that plaintiff did at his own expense make and cause to be made such vault in the said church, and did cause the dead body of the said *M. A. W.* to be buried therein; and did at his own expense, and with the knowledge and consent of defendant, as such rector, put up a tablet or monument near to the same vault, to perpetuate the same, with a certain inscription thereon as follows: (that is to say,) "In a vault beneath this tablet, appropriated to the family of *Thomas Bryan*, Esq. (meaning plaintiff) are the remains of *Mary Ann Williams*, formerly of Mitcham, but late of this parish, spinster, (being the said *Mary Ann Williams* who died 11th September, 1819,) aged 39 years;" and did pay to defendant, as such rector, the said sum of 20*l.* for such permission, and the said sum of one guinea for the service; which sums defendant, as such rector, accepted of plaintiff: Yet defendant well knowing &c., but contriving &c., to deprive plaintiff of the exclusive use and benefit of the said vault, and the exclusive right of interment therein, and to disturb the remains of the said *M. A. W.*, wrongfully and injuriously, without the leave or license and against the will of plaintiff, defaced, injured,

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broke into, dug into and opened, and caused and procured &c., the said vault &c., and interred and caused to be interred the dead body of another person in the same vault: By means whereof plaintiff has lost and been deprived of the benefit and advantage of the said vault or monument and tablet, and of the exclusive right of interment in such vault or monument, and hath been and is greatly injured, &c. The third count, commencing like the others, stated, that plaintiff, by the consent and agreement of defendant, by him as such rector given and made to plaintiff, in consideration of the sum of 20*l.* paid by plaintiff to defendant in that behalf, had become and was entitled to the exclusive use and benefit of a certain vault situate and being in the said church: Yet defendant, well knowing &c., but contriving &c., to deprive plaintiff of the exclusive use and benefit of the said vault, wrongfully and injuriously, without the leave or license and against the will of plaintiff, defaced, injured, broke into, dug into and opened, and caused and procured &c., the said vault &c.: By means whereof plaintiff hath lost and been deprived of the benefit and advantage of the said vault, and of the exclusive use and enjoyment thereof, and hath been and is greatly injured, &c. Plea, not guilty, and issue thereon. At the trial before *Gaselee*, J., at the Sussex summer assizes, 1827 (*a*), the case was this:—The plaintiff was a gentleman having property at Hastings, but residing chiefly at Chelsea. The defendant was the rector of St. Clement, Hastings. In September, 1819, Miss *Williams*, a friend of plaintiff and his wife and family, died at his house at Hastings, and plaintiff, a day or two after her death, called upon defendant by appointment, and told him that he was desirous of purchasing a piece of ground in St. Clement church, to make a family vault for the interment of Miss *Williams* and his family, and to put up a tablet recording the vault as his family vault, and requested the defendant to state what

(*a*) Counsel for the plaintiff, *Gurney* and *Chitty*; for the defendant, *Marryat*.

his demand would be for such purpose. The defendant said, "I shall open my mouth pretty wide." The plaintiff observed, "That is no answer to my question." The defendant said, "Will thirty guineas hurt you?" The plaintiff replied, "Certainly not; but perhaps 20*l.* will satisfy you;" at the same time producing a 20*l.* note. The defendant then said, "Very well, you may do what you please." The plaintiff and the defendant, accompanied by the clerk and a mason, then went to the church, and a spot was selected for the site of the vault; upon which the defendant took the 20*l.* note out of the plaintiff's hand, saying, "Now you may go to work, and do what you please." The plaintiff then said to the defendant, "I suppose the vault will be guarded against all future interruption:" to which the defendant replied, "Certainly, certainly; why it is as good as a freehold." The vault was accordingly made, and the body of Miss *Williams* buried in it, the defendant performing the service, and on that occasion examining the vault, to which he made no objection, but observed that "it had the appearance of a comfortable little room." The plaintiff also paid the defendant one guinea for performing the service, and received from him the following receipt: "Received, 18th September, 1819, of *Thomas Bryan*, Esq. 20*l.*, for permission to make a vault in the church of St. Clement, Hastings, between the south wall and aisle therein, and to put up a tablet or monument to perpetuate the same; and one guinea for the service, &c. *Webster Whistler*, Rector of Hastings." Shortly afterwards a tablet was put up in the church over the vault, bearing the following inscription:—"In a vault beneath this tablet, appropriated to the family of *Thomas Bryan*, Esq. are the remains of *Mary Ann Williams*, formerly of Mitcham, but late of this parish, spinster, who died 11th September, 1819, aged 39 years." The plaintiff paid all the expenses of the vault and the tablet, amounting to near 40*l.* In September, 1825, rather more than six years after the transaction in question, the defendant, after being remonstrated with

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by the churchwarden, broke open the vault, divided it into two by building a brick wall across the centre, and interred in it the dead body of a young lady; upon hearing of which the plaintiff sent to the defendant the following letter:—"With surprise and astonishment I have received information of your having broken into my brick arched vault erected under a pew in the church of St. Clement, Hastings, without my consent. I now desire to be informed by what authority you have so done, violating decency, all sacred rights of interment of the dead, and a breach of your solemn engagement with me; bringing dread and disgust not only to the inhabitants, but to strangers visiting Hastings. Such extraordinary conduct on your part requires immediate explanation, so that I may take such steps as my counsel may advise me to adopt, not only for my own satisfaction, but for that of the public." To this letter the defendant sent the following answer:—"I pass over your officious informant with the utmost contempt, and must acquaint you that I would not if I could, neither did I intend or pretend, to give you a morsel of freehold in the church. I gave you leave to bury there, and to put up a tablet, but not to make a vault capacious enough to contain six coffins, which I did not see till it was dug and paved, and, as soon as I did see it, disapproved. Neither did I see or was consulted upon the inscription on the tablet before it was placed there, which I would not have suffered in that form, nor could I have supposed you would have presumed to have had it so worded without my approbation. As to the fee I claimed before-hand, it was by no means competent, or near so much as you would have paid at most other churches, and which, as your undertaker, the tailor, acknowledged to me when he applied lately to bury a young lady of 14 years, and did approve when it was done in a more substantial manner than before, and without disturbing your friend's remains, which I had the satisfaction to see, at least the coffin, in *statu quo*, and much better secured and preserved than before; and I have likewise the

assurance to give you, that so capacious is it, that it will contain decently and properly three coffins more, and also room for yourself, whenever there is occasion for it. But remember, after the ungracious manner you have paid me the burial fee, and I then objected to the enormous chasm, much as you represent your having paid for the opening of it, if done again, whilst I hold the freehold, the expense shall be much more considerable than you may be aware of. If you write again, pay the postage." The action was brought, and notice of trial had been given, but was countermanded upon the defendant's signing the following agreement:—" The Rev. *W. Whistler* will, with permission of Mr. *Bryan*, excavate the vault sufficiently deep to receive Miss *Fleming*'s coffin, and will indemnify Mr. *Bryan* from ecclesiastical consequences. Mr. *Whistler* will give his bond in a sufficient penalty to restore the vault to its former state at his expense. The bond to apply to securing to Mr. *Bryan* and his family the uninterrupted possession of his vault, during the present incumbency, and to secure the rights of interment to Mr. *Bryan* and his family, at the accustomed burial fee, at their expense of removing the pew from time to time. Mr. *Whistler* will also pay Mr. *Bryan* his costs and expenses in this business, as between solicitor and client; such expenses to be settled and arranged between the respective solicitors for both parties; and in case they disagree, by some third solicitor to be mutually agreed upon. Mr. *Whistler* consents to pay 20*s*. as nominal damages." This agreement was never acted upon. Two objections were made on the part of the defendant. First, that no freehold estate or interest in the vault had passed from the defendant to the plaintiff, no deed of conveyance having been executed, and neither the parol agreement nor the written receipt being adequate for such a purpose. And secondly, that even if such an interest had passed, the action was not maintainable in its present form, but should have been an action of *trespass*. The learned Judge reserved both points, and the plaintiff obtained a

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verdict, with liberty to the defendant to move to enter a nonsuit.

In Michaelmas term last *Marryat* obtained a rule *nisi* accordingly; against which,

Gurney, Hodgson, and *Chitty* now shewed cause. First, this action is maintainable simply as an action on the case for breaking into and injuring the vault, without any reference to the question whether the plaintiff has or has not a freehold interest in the vault, or a right to the future exclusive use of it. This seems clear upon many authorities. Lord *Coke* says (*a*), "If a nobleman, knight, esquire, or other, be buried in a church, and have his coat, armour, and pennons, with his arms, and such other ensigns of honour as belong to his degree or order, set up in the church; or if a grave-stone or tomb be laid or made for a monument of him; in this case, although the freehold of the church be in the parson, and that these be annexed to the freehold, yet cannot the parson, or any other, take them or deface them, but he is subject to an action to the heir and his heirs, in the honour and memory of whose ancestor they were set up." And again (*b*), "Concerning the building or erecting of tombs, sepulchres, or monuments for the deceased, in church, chancel, common chapel, or churchyard, in convenient manner, it is lawful, and the defacing of them is punishable by the common law; as it appeareth in the book of the 9th *Ed.* 4, 14, (the Lady *Wicke*'s case,) and so it was agreed by the whole Court, 10 *Jac.* in the Common Pleas, between *Carver* and *Pym*. And for the defacing thereof, they that build or erect the same shall have the action during their lives, (as the Lady *Wicke* had in the case of the 9th *Ed.* 4,) and after their deceases, the heir of the deceased shall have the action." The same principle is laid down by Sir *Simon Digge*, in his *Parson's Counsellor* (*c*). In *Burn's Ecclesiastical Law* (*d*), it is said,

(*a*) 1 Inst. 18.
(*b*) 3 Inst. 202.
(*c*) C. 12, p. 181.
(*d*) Vol. i. p. 272, 6th ed.

"Monuments, coat armour, and other ensigns of honour, set up in memory of the deceased, may not be removed at the pleasure of the ordinary or incumbent. On the contrary, if either they or any other person shall take away or deface them, the person who set them up shall have an action against them during his life, and after his death the heir of the deceased shall have the same, who (as they say) is inheritable to arms and the like, as to heir-looms; and it avails not that they are annexed to the freehold, though that is in the parson." And *Gibson's Codex*, 453, 454, is referred to. In *Francis* v. *Ley* (*a*), the third resolution, it is said, "Coats of arms placed in any window, or monument in the church or church-yard, cannot be beaten down, or defaced by the parson, ordinary, churchwardens, or any other; and if they be, the heir by descent, interested in the coat, may have an action on the case; as 9 *Ed.* 4, 14." In *Dawney* v. *Dee* (*b*), which was an action on the case for disturbing plaintiff in his enjoyment of seats in the chancel of a church, under which he claimed a prescriptive right appurtenant to his house to bury, it is said, "It was objected that the allegation of the disturbance was ill, without alleging a special disturbance, how he was disturbed particularly, *sed non allocatur:* for it sufficeth to allege a general disturbance: and an express precedent was cited, the case of Sir *John Harvey*, where he prescribed to have to his manor a burying-place and seats within the church, and for disturbance of his burying there, he brought his action, and adjudged for the plaintiff there; wherefore it was adjudged for the plaintiff." If the action lies for an injury done to the ornamental part of a tomb, to the inscription, or the armorial bearings, *à fortiori* it must be maintainable for an actual invasion of the tomb itself; and a vault is a tomb, within the meaning of the original word, *tumulus* (*c*). In *Day* v. *Beddingfield* (*d*), it is said, "if coats of arms are

(*a*) Cro. Jac. 367.
(*b*) Ibid. 604.
(*c*) "*Tumulus, terra tumens;*" Steph. Thes. "Tumulus, a tomb, grave, or sepulchre;" Ainsw. Dict.
(*d*) Noy, Rep. 104.

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put on a window, or upon a monument in the church or church-yard, they may not be broken by the ordinary, parson, churchwarden, or any other. For the heir shall have his action upon the case for that they are and belong to him." *Palmer* v. *The Bishop of Exeter* (*a*), where a suit was promoted in the Spiritual Court by the ordinary to deface some arms which had been put up in a church, shews that the ordinary has not of himself, and as his own act and deed, authority for that purpose. In *Burn's Ecclesiastical Law* (*b*), citing *Gibson's Codex*, 453, it is said, "No person may be buried in the church, without the consent of the incumbent. Our common law hath given this privilege to the person only, in a resolution in the case of *Francis* v. *Ley*" (*c*); so that it is clear the parson has power to grant the privilege of burial claimed in this case. Secondly, if it is necessary, in order to sustain this verdict, that the plaintiff shall have made out his right to the future exclusive possession of the vault, it is submitted that he has done so. The inscription on the tablet, the receipt for the money, the agreement signed by the defendant, the conversation between him and the plaintiff, all the evidence in the case, went to shew that such was the contract between the parties; that the thing bargained for was not the mere privilege of burial in one particular instance, but the perpetual and exclusive use of the vault. But it is said, that such a right being an interest in land, is within the operation of the statute of frauds, and cannot be claimed without a deed in writing. The answer, however, is, that the statute does not apply to such a case as this, because here there is no transfer of the soil, or of any property in it; nor is there any right claimed by the plaintiff which in any manner or degree interferes with, or derogates from, or is inconsistent with the defendant's admitted ownership of the soil. The freehold continues in the defendant precisely as it was before the vault was made; he has still all the

(*a*) 1 Stra. 576.
(*b*) Vol. i. p. 257, 6th ed.
(*c*) Cro. Jac. 367, 4th Resolution.

rights of ownership as rector; the use of the vault claimed by the plaintiff is consistent with the defendant's ownership, and forms in fact one of the purposes for which that ownership was created by law. The authorities already cited shew most clearly that it is the privilege of the parson to determine who shall or shall not be buried in the church, and then it seems to follow that he has the further privilege of saying upon what terms such burials shall take place. Besides, the duty of the parson is co-extensive with his privilege, because the privilege is one that is vested in him for the benefit of others, *pro bono publico*. The defendant, therefore, having decided that the plaintiff should have a vault, and upon what terms, and the vault having been made conformably to those terms, the plaintiff's use or possession of it was a right perfectly consistent with all the rights of the defendant. This is the circumstance which distinguishes this case from one which will probably be relied on by the other side, namely, *Hewlins* v. *Shipham* (*a*); and indeed from all the cases upon the subject which are there cited and reviewed. There, in an action on the *case* for obstructing a drain, the plaintiff claimed *right and title* to the drain by virtue of a license granted to his landlords, *their heirs and assigns*, to make the drain, and to have the foul water pass from their scullery through the drain, across the defendant's yard, into another yard appurtenant to the premises in the plaintiff's occupation. And it was held, that the interest, as declared upon by the plaintiff, being in its nature *freehold*, and the license to support it being merely by *parol*, and not by *deed*, the action was not maintainable. But in that case, and indeed in all others of a similar kind, it is apparent that the right claimed by the plaintiff could not exist consistently with all, and could not be enjoyed without infringing upon some, of the defendant's rights. This is the very principle upon which the common law doctrine of license is founded; and it has been repeatedly decided that a license, although to be exercised in or

(*a*) 7 D. & R. 783; 5 B. & C. 221.

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about land, may be granted by parol, and that when once so granted, and acted upon by the grantee, it cannot be revoked. *Winter* v. *Brockwell* (*a*), and *Taylor* v. *Waters* (*b*), are authorities in point (*c*). In *Winter* v. *Brockwell* it was held that a *parol* license to put a sky-light over the defendant's area could not be recalled at pleasure after it had been executed at the defendant's expense; and that no action lay as for a private nuisance arising from the existence of such skylight. And in *Taylor* v. *Waters* it was held, first, that a beneficial license to be exercised upon land may be granted without deed, and without writing; and secondly, that a license to be exercised upon land for a term of years, granted for a valuable consideration, and acted upon, cannot be countermanded. The latter is a particularly strong and analogous case. It decided that the right of admission to the opera-house, claimed under a silver ticket, might be transferred by parol; and it seems a decisive authority for saying that the right of admission to this vault may be also transferred, or created, by parol. It seems, indeed, almost absurd to talk of a conveyance by deed in such a case as the present. There is no form of deed in existence, nor is it possible for any to be invented, by which such an interest or license as this could be conveyed. But if there were, the grantor was not in a situation to make such a conveyance by deed. He could not bind the ordinary, nor his successor, by deed any more than by parol. Even a faculty, by which it is clear such a right might be vested in the plaintiff, does not amount to a conveyance by deed; and it appears from inquiries made at the Register-office, that a faculty never alleges a title by deed, but merely states that the consent of the parson, &c., has been obtained. Considering the peculiar nature of this case, in which all the rights of the parties have reference to ecclesiastical circumstances, the common law rules as to

(*a*) 8 East, 308.
(*b*) 7 Taunt. 374.
(*c*) And see Bro. Abr. tit. *License*, pl. 1, 7, 9.

transfers of estates and interests in land seem imperfectly, if at all applicable.

F. Pollock, contrà. This action is not maintainable. First, it is obvious that the gist of the grievance complained of is, the infringement of the plaintiff's right to the exclusive possession and use of the vault; and the only question really is, whether the evidence adduced at the trial was sufficient to prove the commission of that grievance. Now in order to produce that effect, it was necessary for the plaintiff to shew a legal title to that right, the invasion of which he complained of; and that he has clearly failed to shew. Admitting that a contract to the effect of that declared upon by the plaintiff was entered into by the defendant, still it was a parol contract only; and being a contract relating to an interest in land, and by parol, it is clearly void by the statute of frauds. The case of *Hewlins v. Shipham*, cited on the other side, is decisive of the present case. The right of resorting from time to time to this vault for the purposes of burial, is precisely the same in point of law as a right to resort from time to time to any other vault or cellar for any other purpose; it is a plain and direct interest in land, which cannot be created or transferred but by deed. Secondly, if the action is maintainable at all, at least it is not in its present form; the remedy for such a grievance as the plaintiff complains of is an action of *trespass*, and not an action on the *case*. This, however, is a point of very minor importance; the main argument is, that the right alleged to have been infringed being an interest in land, granted by parol only, *no* action can be maintained for the supposed infringement of it.

BAYLEY, J.—However much it must be lamented that a person in the situation of the defendant, who has received a considerable sum of money as the price of a right which both parties at the time clearly understood and intended to be conveyed to the plaintiff, should now withhold the right,

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and retain the money, in fraud of his own agreement; still, if in point of law he is enabled so to act with impunity, and he will insist upon the strict law in his favour, he is entitled to do so; and we can only administer the law, whatever we may think and feel with respect to the justice of the case. I am of opinion that the objection taken to the maintaining this action is well founded. If the "exclusive right of interment in," or "possession of," this vault, or the "sole and exclusive use" of the vault, as the declaration variously terms it, of the interruption to which the plaintiff complains, be an interest in land, then, by the statute of frauds, that right could not be conveyed by the plaintiff to the defendant except by writing; and then, as it is admitted that there was no conveyance by writing, the action cannot be maintained; because there was nothing signed here but the receipt for the 20*l.*, which is perfectly silent as to the exclusive use of the vault. Then, is this right an interest in land? or, if not, what is it? If it be an easement only, it still lies in grant, and can pass only by deed. It is, in my opinion, most properly speaking, an easement, or incorporeal hereditament, affecting land, and which could not be created or conveyed by parol. But I entertain great doubts whether the defendant had power to grant such a privilege, even by deed, at least for any longer period or for any other purpose than that of the one burial immediately in contemplation. The freehold of the church, undoubtedly, is in him as the rector; but the rector holds the freehold subject to the jurisdiction of the ordinary, and for general and public purposes, not for his own; for the benefit of the parishioners at large, not for his own sole benefit and emolument. The object is, that he shall be enabled to furnish all his parishioners from time to time with reasonable and convenient space for the purposes of burial, and if he had the power to grant to one individual a right such as the plaintiff now claims, that object might be defeated, because the greater portion of the church might become appropriated to wealthy individuals who

could afford to pay largely to the rector for such a privilege, to the actual exclusion of the poorer parishioners. It seems to me, therefore, that such a right cannot be granted at all, except by means of a faculty, to a parishioner, and annexed to a mansion within the parish. By making such a grant, the rector would, during the residue of his own incumbency, limit the exercise of that discretion, which ought during the whole of his incumbency to be free. There is no necessity that the rector should be empowered to make such a grant, because there will always be time to consult the ordinary, and to take the necessary steps to have it ascertained whether there should or should not be made a vault calculated to contain more than the individual body requiring immediate interment. In the case of a pew, a faculty is clearly necessary for such a grant; and I am at a loss to conceive why it should be so in the case of a pew, more than in the case of a tomb or vault. In both cases the governing principle ought to be, to regulate the accommodation according to the rights and the wants of the parishioners; and I apprehend a faculty can do no more than limit, in the one case the right of sitting, and in the other the right of burial, to inhabitants of the parish. Generally in the case of a pew the faculty is confined to persons inhabiting a particular house within the parish; and if not, if it is annexed to a parishioner, in the character of parishioner, supposing it may be so, still when the party removes from the parish, the exclusive privilege ceases, and the rights of other persons coming into the parish attach. In *Comyns' Digest* (*a*), it is said that a man may prescribe as tenant of an ancient messuage within the parish for a right of separate burial in the church. But prescription, according to the case of *Rogers* v. *Brooks* (*b*), presumes a faculty in the case of a pew, and therefore I apprehend would presume a faculty in the case of a vault. With respect to the form of action, I think *case* and not *trespass*

(*a*) Com. Dig. Cemetery, C. Qy.
(*b*) Cited in *Stocks* v. *Booth*, 1 T. R. 431, n. See *Byerly* v. *Windus*, 7 D. & R. 564; 5 B. & C. 1.

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would have been the proper remedy, supposing the plaintiff had been entitled in point of law to any remedy at all. Com. Dig. tit. *Cemetery*, *Francis* v. *Ley*, *Dawney* v. *Dee*, and all the authorities which lay it down that an action lies for disturbance of a prescriptive right of burial, speak of an action *on the case* as the proper form of action; and therefore I think this action was properly conceived in point of form, if it was maintainable upon the other ground, which I think it is not. In *Francis* v. *Ley*, this sort of right is spoken of, not as an interest in land, but as an easement, or a privilege, or something incorporeal, lying in grant; and for a violation of such a right, case is clearly the proper remedy, as contradistinguished from trespass, which is the proper remedy where the plaintiff is the owner of the soil, and complains of an injury to his exclusive possession of it.

HOLROYD, J.—I am also of opinion that this action was properly brought as an action on the case, supposing it to have been maintainable at all; but I am also of opinion that the right claimed by the plaintiff is an interest in land —not properly speaking an estate, but rather an easement —and therefore requiring a grant in writing for its creation; and consequently that the plaintiff, who claims only by a parol grant, has no right of action at all.

LITTLEDALE, J.—I agree that this action is not maintainable. I do not think that the right claimed can properly be called an estate or interest in land, within the meaning of the statute of frauds. An interest in land is either an estate in fee simple, in fee tail, for life, or for years, or at will or sufferance; it is something which is properly designated an *estate*. But, as it seems to me, any privilege which the rector could grant in any event as applicable to a case of this kind—or rather any privilege which he has granted, because, perhaps, having the freehold, he might, as against himself, grant more—does not confer any thing

that can be properly called an estate or interest in land. It is only the privilege of making a vault, and of having the sole and exclusive right of burying there, which is not, in my opinion, any interest in the soil itself. For although the vault was to be surrounded with stone and brickwork, so that in fact no person could enter it without breaking through the arch, still I think the plaintiff had only the liberty and privilege of depositing dead bodies there, and that he could not have excluded the rector, or the ordinary, or the churchwarden, or any person who had an interest in the church, from entering the vault, if it was necessary to do so for the performance of any religious ceremony, or for any other of the purposes of the church. The right claimed by the plaintiff appears to me, therefore, to be only an easement, giving him the sole and exclusive privilege of burying in the vault; which, however, is considered, and can only pass, as appurtenant to something else. It is called an easement in *Com. Dig.* Burial, B. *(Qy.)* It is there said that a man may prescribe, that being tenant of an ancient messuage he ought to have separate burial within such a vault in the church, or in such an aisle, or in the quire. It seems then that it is by prescription only a man can claim a right of separate burial; and what is this but a claim of a right of separate burial? The ground of my opinion, therefore, is, that the rector had no right to grant that which he has granted, either by deed or parol. I do not see how this can be put on a different footing from an exclusive right to a pew, which can be claimed only by prescription as appertaining to an ancient messuage, or by a faculty. It is said the rector may grant this right, because he has the freehold of the church. I admit that he has, and of the church-yard; and he has the general right of regulating the burials, both in the church and the church-yard. With respect to the church, he seems to be the only person who has a right to grant privilege of burial there; at least it seems to have been so considered in *Francis* v. *Ley*, the fourth resolution, which has been already

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quoted. But the ground of the parson's right, as there stated, seems to be somewhat different from what is laid down by *Burn* from *Gibson's Codex* (*a*); for he says this:— "*Lanfranc*, Archbishop of Canterbury, seems to have been the first who brought up the practice of vaults in chancels, and under the very altars, when he had rebuilt the church of Canterbury. No person may be buried in the church, or in any part of it, without the consent of the incumbent. In some of the foreign canons it is said, without consent of bishop *and* incumbent; in others, without consent of bishop *or* incumbent. But our common law hath given this privilege to the parson only, exclusive of the bishop, in a resolution in the case of *Francis* v. *Ley*, H. 12 Jac. Cro. Jac. 367, that neither the ordinary himself, nor the churchwardens, can grant license of burying to any within the church, but the parson only; because the soil and freehold of the church is only in the parson, and in none other. Which right of giving leave will appear to belong to the parson, not as having the freehold, (at least not in that respect alone,) but in his general capacity of incumbent, and as the person whom the ecclesiastical laws appointed the judge of the fitness or unfitness of this or that person to have the favour of being buried in the church. For anciently (as was said) the burying not only in temples and churches, but even in cities, was expressly prohibited. And afterwards, when the burying in churches came to be allowed and practised, the canon law directeth that none but persons of extraordinary merit shall be buried there; of which merit (and by consequence of the reasonableness of granting or denying that indulgence) the incumbent was in reason the most proper judge, and was accordingly so constituted by the laws of the church, without any regard to the common law notion of the freehold's being in him, which, if it proves any thing in the present case, proves too much; that neither without the like leave may they bury in the church-yard, because the freehold of that also is de-

(*a*) 1 Burn's E. L. 206, 7.

cleared to be in him." Then if the parson has the right to exercise, he has also the duty to perform, of deciding who ought or ought not to be buried in the church; and the ground on which he has the right seems to be, his being under the obligation to perform the duty. If so, he cannot be allowed, by delegating his right, to neglect his duty, which he must do by granting the privilege of perpetual exclusive burial in a vault; for then persons dying out of the parish, and being wholly unconnected with it, may at future periods be buried there, at the option of the proprietor of the vault, and without the sanction of the incumbent. The form of action, I think, is right (*a*). I do not conceive that any deed of conveyance could have been framed to effect the intention of these parties; but the ground on which my judgment is formed is, that the whole proceeded on an agreement which, as it was unlawful for the defendant to make, it is incompetent for the plaintiff to enforce.

Rule absolute to enter a nonsuit.

(*a*) But see *Spooner* v. *Brewster*, 3 Bingh. 136; 2 C. & P. 34.

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TRESPASS for breaking and entering plaintiff's close, with feet in walking, and the feet of horses, &c., and the wheels of carts, &c., spoiling the grass, with spades, &c. digging peat and turf, spreading peat, digging drains and ditches, burning peat, and carrying away the ashes, &c. Pleas, first, as to cutting and digging peat and turf, *actio non*, because at the time when, &c. plaintiff was tenant to defendant of the close in which, &c. subject to a certain reservation to defendant of all pits in the said close, whether opened or not opened, with free ingress, egress, and regress

A plea to trespass *quare clausum fregit*, stating that plaintiff was tenant to defendant of the close, subject to a *reservation* to defendant of all pits n the close, with ingress, &c., to cut and carry away peat and turf, interest in the

is bad on demurrer; first, for not shewing how and when defendant's close commenced; and secondly, for alleging a *reservation* of what is properly the subject of *exception*.

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to and for defendant to dig, cut, and carry away the produce of the said pits at all seasonable times of the year; and that during the said tenancy defendant having occasion for peat, at the said time when, &c., being a seasonable time of the year, for that purpose broke and entered, &c. Second, as to spoiling the grass with horses and carriages, that plaintiff was tenant to defendant of the close in which, &c., subject to a certain reservation to defendant of all mines, quarries and pits in the close, open or not opened; and that during the said tenancy, at the said time when, &c., being a seasonable time for that purpose, defendant broke and entered the close, and cut and dug the peat in certain open pits of peat, and for the purpose of carrying away the peat, with horses and carriages broke and entered, &c. To these pleas there was a replication and new assignment, followed by a rejoinder and pleas to the new assignment, to which there was a surrejoinder, with demurrers to some, and replications to others of the pleas to the new assignment. But it is unnecessary to set these out, the question turning entirely on the validity of the two pleas set out above.

E. Lawes, Serjt. in support of the demurrers. The pleas in question are clearly bad; in fact they are no pleas at all. They merely allege a tenancy in the plaintiff from the defendant, with a reservation to the defendant of the peat and the right to dig it. They do not shew that the defendant has any interest in, or title to, the *locus in quo*, nor how, nor when the plaintiff's tenancy was created. Now it was decided in *Bullard* v. *Harrison* (*a*), that a way of necessity cannot be pleaded generally, without shewing the manner in which the land, over which the way is claimed, is charged with it. These pleas consist entirely of legal results or effects; they do not allege any matters of fact upon which the plaintiff could possibly take issue. *Earl of Cardigan* v. *Armitage* (*b*) is an authority to shew

(*a*) 4 M & S. 387. (*b*) 3 D. & R. 414.

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that such a reservation as that set out in these pleas is bad. It is in fact not a reservation; it is, if any thing, an exception. Lord *Coke* says (*a*), "note a diversity between an exception, (which is ever part of the thing granted, and of a thing *in esse*,) and a reservation, which is alway of a thing not *in esse*, but newly created or reserved out of the land or tenement demised." Again he says (*b*), "A man upon his feoffment or conveyance cannot reserve to him parcel of the annual profits themselves, as to reserve the vesture or herbage of the land, or the like, for that should be repugnant to the grant. *Non debet enim esse reservatio de proficuis ipsis, quia ea conceduntur, sed de redditu novo extra proficua.*" So *Sheppard*, in his *Touchstone* (*c*), speaking of a reservation, says, "It must be of some other thing issuing, or coming out of the thing granted, and not a part of the thing itself, nor of some thing issuing out of another thing." —"If a man grant land, yielding for rent, money, corn, a horse, spurs, a rose, or any such like thing; this is a good reservation: but if the reservation be of the grass, or of the vesture of the land, or of a common, or other profit to be taken out of the land; these reservations are void." Upon these authorities, which are expressly in point, the reservation here pleaded is clearly void, and the pleas bad.

Jeremy, contrà. It is admitted that the privilege stated in these pleas to be *reserved* to the landlord, might properly have been *excepted* out of the demise or grant by him to the tenant. [*Bayley*, J. This is, properly speaking, an exception, and not a reservation. It is in effect an exception, and of a privilege which might properly be excepted. But the pleas call it a reservation; and as a reservation it is clearly bad: then are not the pleas bad also?] If that be the view of the case taken by the Court, it is perhaps useless to endeavour further to support the pleas.

(*a*) Co. Litt. 47 a; 2 Tho. Co. Litt. 412.

(*b*) Co. Litt. 142 a; 1 Tho. Co. Litt. 442.

(*c*) First edit. 80; 5th edit. 78.

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BAYLEY, J.—The pleas are clearly bad. A landlord cannot *reserve* a component part of the land demised or granted, as he has done here. Besides, the pleas do not shew how or when the defendant's interest in the land commenced, which they certainly ought to do. They state no facts upon which an issue could be joined; they set forth legal effect only. The plaintiff is entitled to judgment on the demurrers.

The other Judges concurred.

Judgment for the plaintiff on the demurrers.

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Devise "to *A.* for life, and from and after her decease to the surviving children of *B.* and *C.*" The only child of *B.* died during the life of *A.*: Held, that the period of survivorship referred to the death of the testator, and that the heir-at-law of the deceased child of *B.* was entitled to share with the children of *C.* who survived *A.*

THIS was an action of ejectment, brought to recover one-seventh share of certain lands in the several parishes of Ripple and Upton, in the county of Worcester, more particularly described in the declaration, which the plaintiff claimed to be entitled unto, under the will of one *William Shipman*. The case came on to be tried at the Spring Assizes, 1827, for the county of Worcester, when the plaintiff was nonsuited, with liberty to move to enter a verdict for the plaintiff, if this Court should be of opinion that he was entitled to recover; and upon that motion being made in the subsequent Term, the Court directed the facts to be stated in the following case:—

William Shipman, being seised in fee of the premises in question, made his will, which was duly executed and attested so as to pass real property, bearing date the 6th day of February, 1782, and by his said will devised the premises in question, with others, to his mother, for "her natural life only," and after the death of his mother, to his wife for her natural life only. He then devised as follows: "And from and after the decease of my mother and wife, I give and bequeath all the above-mentioned premises unto the surviving children of *William Jennings*, of Berckley, in the county of Worcester, and of *John Warren*, of Phelps in Twining, Gloucestershire, and to their heirs for ever, the

rents and profits to be divided between them in equal proportions, share and share alike." He then devised other real property immediately to his wife in fee. The will further contained the following clause:—"And whereas I now stand indebted to Mr. *John Jones*, of Lulsley Hill, (which said *John Jones* was the father of the testator's wife) in a considerable sum of money upon bond; now if the said Mr. *Jones* will, at the time of my death, give up the said bond to my executrix hereafter named, (testator's wife,) and not insist upon the payment of the money, all the above devises respecting his daughter to stand good; but if he demands payment of the money, it is my will that all the above devises to my wife shall be void and revoked, and she shall have nothing but what was settled on her before marriage; and in that case I give and bequeath unto my mother all the above-mentioned estates, real and personal, for her natural life only, and from and after her decease to the surviving children of *William Jennings* aforesaid, and *John Warren*, and to be divided amongst them as above-mentioned." The testator died in August, 1785, without having altered or revoked the above in part recited will. At the time of the testator's death there were living his mother and wife, six children of the said *William Jennings*, and one child of the said *John Warren*, who was a daughter, and afterwards married one *Wakeman Long*, and was the mother of the lessor of the plaintiff, (who was her heir at law,) and attained the age of twenty-one years in September, 1823. It did not appear that the said *John Jones* ever claimed his debt, and the wife of the testator took the estates and interests given and bequeathed to her by her husband's will, and enjoyed the same until her death. The testator's wife, who was the surviving tenant for life, died in the year 1810. The said daughter of the said *John Warren* died in the year 1803, and at the time of the death of the said testator's wife in 1810, there were only four children of *William Jennings* then surviving. The question for the opinion of the Court is, to what period the words "sur-

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viving children" shall refer. Whether to the period of the death of the testator, at which time there were the said six children of *Jennings*, and the said daughter of the said *John Warren* him surviving; or to the period of the death of the said testator's wife in 1810, at which latter period there were only four children of *Jennings* her surviving, and no child of *Warren*. If the Court shall be of opinion upon the construction of the will, that the period of survivorship relates to the death of the testator, then the plaintiff will be entitled to recover an undivided seventh-part, and a verdict is to be entered accordingly. If the Court shall be of opinion that the period of survivorship relates to the death of the said testator's wife, then the nonsuit is to stand.

Curwood, for the plaintiff. The words "surviving children" in this will must be construed to refer to the period of the death of the testator. Looking at the will altogether, or as Lord *Kenyon* once expressed himself, "looking into all the four corners of the will," which is the proper mode to be adopted for the purpose of discovering the intention of the testator (*a*), the intention of this testator seems clearly to be, to refer the survivorship of the children to the period of his own decease. *Rose* v. *Hill* (*b*) seems an authority in point. The words of the devise there were very similar to the words of the devise in question. They were, "to my five children," naming them, "and the survivors and survivor of them, and the executors and administrators of such survivor, share and share alike, as tenants in common, and not as joint tenants." It was held, that the words "survivors and survivor" related to the period of *the testator's death*. Unless the same construction be adopted in this case, the same words of devise will convey different estates dependent on a contingency. Such a

(*a*) See the observations of *Abbott*, C. J. and *Best*, J. upon this point, in *Doe* v. *Turner*, 2 D. & R. 402, 404.

(*b*) 3 Burr. 1881.

devise would be void for uncertainty. In *Doe* v. *Maxey* (*a*) the testator devised all his real estate (except at S.) to the head of his family for life; and then to several of the junior branches, in succession, to each for life; with remainder to his first and other sons in tail male; with the ultimate remainder to his own right heirs. He then devised his estate at S. to some, by name, of the junior branches, but not to all of those to whom he had devised the first estate, and varying the order of succession, to each for life, with remainder to his first and other sons in tail male; and then devised that "for default of such issue," the estate at S. should go "to such person and persons, and for such estate and estates, as should at that time, (*i. e.* on the death of the last tenant for life named, without issue male,) and from time to time afterwards, be entitled to the rest of his real estate, by virtue of and under his will." It was held, that the ultimate remainder in fee of the estate at S. vested by descent in the person who was the testator's heir *at the time of his death*, and did not remain in contingency under the will till the death of the last tenant for life, without issue male, who was named in the devise of that estate.

G. R. Cross, contrà. The construction contended for on the other side rejects the word "surviving" from the devise altogether, or at least renders it wholly useless and inoperative. Such a construction is most unnatural, and has been decided to be so in many cases. *Hawes* v. *Hawes* (*b*), *Brown* v. *Bigg* (*c*), *Stringer* v. *Phillipps* (*d*), and the other cases of that class, which at first sight appear to be in favour of the plaintiff, contained the words "survivors or survivor," with other words, clearly shewing the intention of the testator to create a tenancy in common. And there the difficulty arose how the devisees could be constituted tenants in common with benefit of survivorship, and in order to get over that difficulty, and prevent a lapse, it was held, that the words of survivorship should be referred back

(*a*) 12 East, 589.
(*b*) 1 Ves. sen. 14; 3 Atk. 524; 1 Wils. 165.
(*c*) 7 Ves. 279.
(*d*) 1 Eq. Ca. Abr. 292.

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to the period of the testator's death. Thus in *Rose* v. *Hill* (*a*), Lord *Mansfield* said, "It is plain that they were not to take as joint tenants. And it is plain to me that he considered that several of his five children might happen to die in his own life-time; and, therefore, makes a provision for such of them as should survive him and be in existence at the time when the interest was to vest, and their representatives. He meant to prevent a lapse; and, therefore, we may rather apply the words to a final particular time, than give no meaning at all to them. And this is agreeable to the case of *Stringer* v. *Phillipps*." But in this case the language used is different. Here the testator devises "from and after the decease of my mother and wife, unto the surviving children of *A*. and *B*., and their heirs for ever, the rents and profits to be divided between them in equal proportions, share and share alike." There the persons at whose death the survivorship is intended to operate, are clearly and expressly pointed out, namely, the testator's mother and wife. They were to take first as tenants for life, and the rule of construction adopted by the Courts of Equity in such cases is, to refer the survivorship to the period of the death of the tenant for life. In *Newton* v. *Ayscough* (*b*), it was held, that under a bequest over, after an interest for life, by words importing both a joint interest and a tenancy in common, as to three, "or the survivor, share and share alike," the period to which the survivorship relates, depends not on any technical words, but on the apparent intention collected from the particular disposition, or the general context. In *Houghton* v. *Whitgreave* (*c*), there was a gift of real and personal estate, after a life-interest to the testator's widow, to trustees, to be converted into money, and divided among several persons named, and the survivors or survivor of them: and it was held, that those only were entitled who survived the widow. In *Cripps* v. *Woolcott* (*d*), it was held, that words of survivorship in a legacy are to be referred to the period of division

(*a*) 3 Burr. 1885.
(*b*) 19 Ves. 534.
(*c*) 1 J. & W. 146.
(*d*) 4 Madd. 11.

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and enjoyment, unless a special intent to the contrary is to be found in the will; and that if there be no previous life estate given in the legacy, the period of division is the death of the testator, but if a previous life estate is given, then the period of division is the death of the tenant for life. [*Bayley*, J. *Edwards* v. *Symonds* (*a*) seems against you. There *A.* bequeathed one shilling to his eldest son and heir-at-law, and then devised his estate to trustees for the maintenance of his six younger children, naming them, and immediately on the youngest attaining the age of twenty-one, then, to his said six children, and the survivor and survivors of them, their heirs and assigns for ever, as tenants in common: and it was held, that the term "survivor and survivors" was to be referred to the testator's death, and not to the coming of age of the youngest child.] That case differs from the present in the particular already adverted to; the words there are "survivor and survivors;" here they are "surviving children." [*Littledale*, J. Lord Chief Baron *Comyns* lays down the general rule of construction in such cases to be to refer the survivorship to the period of the testator's death.] The survivorship must have reference to the period when the estate devised vests, which in this case is at the death of the tenants for life, not at the death of the testator. The devise to the children is *from and after* the death of the mother and wife. There is no devise or gift to the children at all until after the death of the surviving tenant for life. It is a devise or gift to them, or such of them as may be living, after the death of the surviving tenant for life. In *Bartlett* v. *Holliston* (*b*) there was a devise of land in trust for the testator's daughter for life, remainder to the heirs of her body, and if she died without issue, to sell, and divide the money among all and every the children of his sisters. The sisters had several children born in the life-time of the testator, and one of them had a child born after his death, but in the life-time of his daughter. It was held, that the after-born child was

(*a*) 6 Taunt. 213; 2 Marsh. 24. (*b*) Ambler, 334.

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entitled to a share of the money. In *Ellison* v. *Airey* (*a*), the devise was to *Elizabeth*, to be paid at twenty-one or marriage; but if she died before, then to the younger children of *Francis;* and it was held, by Lord *Hardwicke*, that this extended not to all the younger children, nor was it confined to those who were the younger at the making of the will, or at the death of the testator; but applied to those who were so at the death of *Elizabeth*, before her attaining twenty-one, or at her dying before marriage. In *Ayton* v. *Ayton* (*b*), the case was this: *George Lee*, by will dated 10th October, 1762, bequeathed to his wife, *Mary Lee*, the residue of his real and personal estate *for life;* and *after her death* he gave the same to the children of Mr. *John Ayton* and his wife *Jane*, to be equally divided among them the said *Jane Ayton*'s children, and not any children of any other marriage by either party. The testator died 15th December, 1762, without issue. *Mary Lee*, his widow, died 11th April, 1763. At the death of the testator and his widow, *John Ayton*, *Susannah Ayton*, and *Mary Ayton*, (since dead,) were the only children of *John* and *Jane Ayton* then born, but they had afterwards three other children, *Hannah*, *Jane*, and *Elizabeth*, all born after the death of the wife. The Master of the Rolls, (the late Lord *Kenyon*,) declared that the interest in the residue of the testator's personal estate vested absolutely in the three children of *John* and *Jane Ayton*, who came into *esse* during the life of *Mary Lee*, and that those born after were not entitled to a share. [*Bayley*, J. Adopting your construction, and supposing that one of the tenants for life had survived all the children, the devise to the children would have lapsed altogether. *Littledale*, J. *Doe* v. *Lawson* (*c*), and the cases cited in the judgment of the Court there, seem all against you. There, one devised to his natural son, and in case of his marriage with certain persons, or his dying without issue, then to his nephew for life, and after his

(*a*) 1 Ves. sen. 111.

(*b*) 1 Bro. C. C. 542, n.; 1 Cox, 327.

(*c*) 3 East, 278.

decease, then for and among such person or persons, his and their heirs, &c. as should appear, and could be proved to be his next of kin, in such proportions as they would, by virtue of the statute of distributions, have been entitled to his personal estate, if he had died intestate: and it was held, that the distribution was to be made among those who were the testator's next of kin at the time of his death, though the nephew, to whom a prior life-estate was given, was one.]

The case was argued at the sittings in *Banc* after last Hilary Term, when the Court took time for consideration. Judgment was now delivered by

Bayley, J.—The question in this case arose upon the construction of the will of the testator, *William Shipman*, and particularly upon the effect of the limitation in the remainder over to the children of *William Jennings* and *John Warren*. The testator devised certain premises to his mother for her natural life; after her death, to his wife for her natural life; and from and after the decease of his mother and wife, to the surviving children of *Jennings* and *Warren*, and to their heirs for ever, the rents and profits to be divided between them in equal proportions, share and share alike. He then revoked the devise to his wife upon a contingency, which never happened; and in the event of that contingency happening, devised the premises to his mother for her natural life, and from and after her decease to the surviving children of *Jennings* and *Warren*, to be divided among them as above-mentioned. The surviving children of *Jennings* and *Warren*, therefore, were to take the estate upon the death, in the one case of the testator's mother and wife, and in the other of his mother only; and the question was, when any interest under this devise vested in those children, whether at the death of the testator, or at the death of the tenant, or tenants, for life; in other words, whether "surviving children" means such as were living at the death of the testator, or such as were living at the death of the tenants for life, who survived him.

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Generally speaking, the rule of construction in such cases is clear, that all the children who are *in esse* at the period of the testator's death, *then* take a vested interest, which is transmissible to their respective heirs immediately. For that position, *Baldwin* v. *Karver* (*a*), *Doe* v. *Perryn* (*b*), *Meredith* v. *Meredith* (*c*), and *Right* v. *Creber* (*d*), are all clear authorities. Where there is a limitation by remainder to children, who shall be *in esse* at the happening of a contingent event, there the remainder is contingent, and no interest vests until the event happens. *Right* v. *Day* (*e*). If the demise here had been to the children generally, without adding the word "surviving," there would have been no doubt that this case would have ranged within the first class of cases I have mentioned, and that the estate would have vested in the children from the moment of the testator's death. The insertion of the word "surviving" creates the whole doubt and difficulty, and raises the question, to which period the survivorship is to refer, whether to that of the testator's death, or to that of the death of the tenants for life. The law always inclines so to construe a devise as to make the estate vest; and the probable intention of the testator in this, as in other cases, was to render the limitation to the children certain and secure. If upon the face of the will a contrary intention is apparent, that intention must be effectuated; where no such intention is apparent, the Courts have always acted upon the probable intention of the testator, and the general inclination of the law to make the estate vest. We have not been able to find any decided case precisely like the present; but there are many which strongly resemble it. There are many cases where the word "surviving" has been held to have relation to the period of the testator's death. Some, where the devise being to several as tenants in common, a different construction would cause a lapse of the devise. Some, where the limitation is by remainder in the alternative, either at the

(*a*) Cowp. 309.
(*b*) 3 T. R. 484.
(*c*) 10 East, 505.
(*d*) 7 D. & R. 718; 5 B. & C. 866.
(*e*) 16 East, 67.

death of the testator, or of the tenant for life, and where the former is preferred, for the sake of vesting the estate. In *Wilson* v. *Bayley* (*a*), the devise was in these words:— "Item; my will is, that in case both my said sons, *Mark* and *John*, shall happen to die unmarried, and that neither of them shall have any issue lawfully begotten, then my daughters, *Mary*, *Sarah*, and *Catherine*, and the survivors and survivor of them, and their assigns, be permitted to receive all the rents, issues, and profits of all the said leases, lands, and premises, as tenants in common, and not as joint tenants." The testator died, leaving the sons and daughters mentioned in the devise, and another daughter, whose interests were the subject of discussion in the case in question, but form none for consideration in the present. *Mark* died a bachelor; *John* thereupon became seised, and continued in possession until his death; *Mary* married, and died without issue; *Sarah* married, and died, leaving issue; *John* married, survived all his sisters, except *Catherine*, and died without issue; *Catherine*, the youngest daughter, survived all her brothers and sisters, and as such survivor claimed the benefit of the whole devise. The children of her deceased sister claimed to share. The Court of Chancery in Ireland decreed the whole to the surviving sister; but this part of the decree was reversed in the House of Lords in England; and it was adjudged that, upon the contingencies which had happened, the estates in question were well devised to the testator's daughters as tenants in common, and that the children of the deceased sister were entitled to share. In *Perry* v. *Woods* (*b*) there was a legacy to *A.* for life, and after her decease to her children; but if she should leave none, then to *B.* and *C.* share and share alike, or to the survivor. It was held to be a vested interest in *B.* and *C.* upon the death of the testator, as tenants in common, for *A.*, though she survived *B.* and *C.*, died without children. In *Roebuck* v. *Dean* (*c*), a trust was created by will to pay the dividends of stock to

(*a*) 5 Bro. P. C. 388; 2d edit. vol. iii, 195.

(*b*) 3 Ves. 204.

(*c*) 4 Bro. Ch. Ca. 403, 2 Ves. jun. 265, S. C.

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the niece of the testatrix for life, and after her death to divide the capital among the brothers and sister of the testatrix, and in like manner to the survivor; and it was held that, notwithstanding the last words, the shares of those who died in the life-time of the niece passed to their representatives. In *Maberly* v. *Strode* (*a*), the principle laid down was, that words of survivorship, added to tenancy in common in a will, are to be applied to the death of the testator, unless an intention to postpone the vesting is apparent. The devise in that case was, to the son of the testator for life; and in the event of his dying without issue, the words run thus:—"unto my nephews, *William* and *James Strode*, and to my niece, *Cecil Strode*, in equal proportions, share and share alike, his, her, and their issue, or the issue of either of them to take their parents' share, with benefit of survivorship to my said nephews and niece." The testator's son died without issue; the niece died in the life-time of the son, unmarried; one of the nephews died in his life-time, leaving issue; the other nephew survived; and the question was, whether the children of the deceased nephew should share with the surviving nephew, or whether the latter should take the whole. Sir *Pepper Arden*, then Master of the Rolls, in his judgment observed, "In the opinion I have formed upon the words of survivorship, I found myself upon what I thought I was warranted to do in *Perry* v. *Wood*, where I had occasion to look into all the authorities; and I relied upon *Stringer* v. *Phillips*, followed by *Roebuck* v. *Dean*, which is almost exactly the present case, and there the Lord Chancellor thought himself warranted to follow *Stringer* v. *Phillips*. All the cases were considered in *Perry* v. *Woods*; and *Brograve* v. *Winder* (*b*) was urged as an authority that the Lord Chancellor had changed his opinion. I have looked into those cases, rather wishing to found my opinion upon them. *Roebuck* v. *Dean* is as near this case as can be. *Lord Bindon* v. *Lord Suffolk* (*c*) seems, as the Lord Chan-

(*a*) 3 Ves. jun. 450.
(*b*) 2 Ves. jun. 634.
(*c*) 1 P. Wms. 96.

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cellor said, to have had a very odd fate in the House of Lords. Considering *Stringer* v. *Phillips* recognized by Lord *Hardwicke* (*a*), his lordship thought it safer to adhere to that. It is very true, in *Brograve* v. *Winder*, he was of opinion the words were such as plainly proved the vesting was postponed. He gives his reasons, but does not retract what he said in *Roebuck* v. *Dean*, but founds himself upon the words; from which it plainly appeared, that the time of distribution was the time to which the words were meant to apply. I followed that and *Stringer* v. *Phillips* in *Perry* v. *Woods*. This case is very nearly the same as those, perhaps stronger; for the life of the son is a very long period, within which it was very likely every one of these nephews and nieces might be dead; in which case there would be a total intestacy; and that is one reason why it is necessary to adopt, if possible, the construction of the word "survivorship" as applicable only to the death of the testator. The construction that the benefit of survivorship was to prevent a lapse, and that the interests vested at the death of the testator, is much the most beneficial construction. Upon these authorities, I am of opinion that upon these blind words, the safest and soundest construction—best warranted by the authorities—most beneficial to the parties—most likely to be intended—is, that the meaning is, such as shall survive the testator; but that it is not meant that it should remain in contingency, and vest only in such as should happen to survive the son, with the chance of the whole being lost, and a total intestacy occasioned." The language of the Master of the Rolls there is strong, and applies pointedly to the present case. Upon general principles, there seems to be no good reason why the vesting of the estate should be postponed beyond the period of the testator's death; and there is a very good reason against so postponing it, namely, the danger of producing a lapsed devise. *Edwards* v. *Symonds*, to which I referred in the course of the argument, is a recent decision of the Court of Common Pleas supporting this view of the

(*a*) 1 Vez. sen. 14.

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case; and seems to me an authority in point. *Rose* v. *Hill*, cited by Mr. *Curwood*, and the other cases of immediate devise, do not appear to me to be so much in point as those I have now referred to. Here the testator's death was the period at which he himself, in all probability, intended the devise to the children to take effect; and we are, therefore, upon the whole, of opinion, that the estate did vest at the period of the testator's death in such of the children of *Jennings* and *Warren* as were *then* living, and that the lessor of the plaintiff, as the heir of one of those children, is entitled to a proportionate part, namely, one seventh.

Judgment for the Plaintiff accordingly (*a*).

JOSEPH PRATT, administrator of ANN PRATT, *v.* SWAINE.

In trover by an administrator "not guilty of the premises within six years" is a bad plea, not being equivalent to an allegation that the cause of action did not accrue within six years.

TROVER. The declaration stated that *Ann Pratt* in her lifetime, to wit, on, &c. at, &c. was lawfully possessed of divers goods and chattels (enumerating them) as of her own property, and being so possessed thereof, she afterwards, to wit, on, &c. at, &c. died so possessed, after whose death, to wit, on 20th October, 1820, the said goods and chattels came to the possession of defendant by finding, and afterwards, and after the death of the said *Ann Pratt*, to wit, on 4th May, 1822, administration of all and singular the goods and chattels of the said *Ann Pratt* was granted to plaintiff; yet defendant, well knowing the said goods and chattels to be the property of the said *Ann Pratt* in her lifetime, and at the time of her death, and to belong to plaintiff as administrator as aforesaid, after the death of the said *Ann Pratt*, but contriving to injure plaintiff as administrator as aforesaid, had not delivered to him the said goods and chattels, although requested so to do, and defendant *afterwards, and after the death of the said Ann Pratt*, to wit, on 1st January, 1823, converted and disposed of the same to his, defendant's, own use. Plea, that de-

(*a*) And see *Drayton* v. *Drayton*, Dessaus. Cha. Rep. 324; *Campbell* v. *Heron*, Cam. & Norw. Rep. 298; *Evans* v. *Brittain*, 3 Serg. & Rawle, 135; *Bayley* v. *Bishop*, 9 Ves. jun. 6.

fendant was not guilty of the premises in the declaration mentioned, or of any or either of them, at any time within six years next before the exhibiting of plaintiff's bill, in manner and form as plaintiff had complained against him, defendant. Special demurrer, stating, that the plea was argumentative and uncertain, and did not shew explicitly that the action was not commenced in due time, according to the Statute of Limitations; for although defendant might not have been guilty of the premises mentioned in the declaration within six years next before the exhibiting of plaintiff's bill, the causes of action might have accrued to plaintiff as administrator within that period. Joinder in demurrer.

Chitty, in support of the demurrer. The plea is clearly bad. It has been decided that to a declaration in an action on the case, founded in tort, a plea of not guilty of the supposed grievances in the declaration mentioned, within six years before the exhibiting of plaintiff's bill, is bad on special demurrer. *Dyster* v. *Battye* (*a*). It has also been decided that in an action of assumpsit by an administrator upon a bill of exchange, payable to the testator, but accepted after his death, the Statute of Limitations begins to run from the time of granting the letters of administration, and not from the time the bill becomes due, there being no cause of action until there is a party in a capacity to sue. *Murray* v. *The East India Company* (*b*), Upon that principle it follows that the plaintiff in the present case had no cause of action until the letters of administration were granted to him. The defendant ought to have shewn upon the face of his plea that the cause of action did not accrue within six years, whereas he has only alleged that he was not guilty of the premises within six years, which may be true, and yet the cause of action may have accrued to the plaintiff, as administrator, within six years.

Coleridge, contrà. The gist of this action is the conversion; and the declaration avers that the conversion took

(*a*) 3 B. & A. 448. (*b*) 5 B. & A. 204.

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place *after* the letters of administration had been granted. It states first, that administration was granted to the plaintiff, and then, that the defendant, knowing the goods to belong to the plaintiff as administrator, *afterwards* converted them to his own use. [*Holroyd*, J. The words are, "afterwards and after the the death of *Ann Pratt*," shewing that the word "afterwards" applies to something done after her death.]

BAYLEY, J.—If the plaintiff had joined issue upon the plea, and had proved a conversion *prior* to the granting of the letters of administration, he would have supported the allegation in the declaration, notwithstanding the insertion of the word *afterwards*. As soon as letters of administration are granted, the administrator becomes clothed with all the rights which appertained to the testator at the time of his death; but no right of action accrues to the administrator until he has sued out letters of administration. It may, consequently, be true, that the defendant has not been guilty of any conversion within six years, and yet that the cause of action has accrued to the plaintiff within six years. If a defendant wishes to secure the protection afforded by the Statute of Limitations, he must take care to shew by his plea that the cause of action did not accrue within six years; and he must claim the benefit of the statute either in the very words of the statute itself, or at least in words of equivalent import. He has not done either in the present case, and upon that ground I am clearly of opinion that his plea is bad.

HOLROYD, J. concurred.

LITTLEDALE, J.—The act of Parliament ought to be pleaded in the very words of the act itself. The common form is undoubtedly that adopted in the present case, but it is a deviation from the language of the statute.

Coleridge, prayed leave to amend, which was granted upon payment of costs.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

TRINITY TERM,

IN THE NINTH YEAR OF THE REIGN OF GEORGE IV.

FAIRLIE *v.* DENTON and BARKER, Gents. two, &c.

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ASSUMPSIT for money had and received by the defendants to the plaintiff's use; with the other money counts. Plea, non assumpsit, and issue thereon. At the trial, before Lord *Tenterden*, C. J., at the London Adjourned Sittings after last Michaelmas Term (*a*), the case was this:—The plaintiff was a timber merchant; the defendants were attorneys, and were proprietors, jointly with a Mr. *Perry*, a surveyor, of a plot of building ground, part of which they, in October, 1826, agreed to let to two bricklayers named *Crossland* and *Stonehouse*, for the purpose of building certain houses thereon. An agreement to the following effect was accordingly entered into between those parties:—"Defendants and *Perry* to grant to *Crossland* and *Stonehouse*, their executors, &c., or to their nominees, lease or leases of the ground, to hold to them, their executors, &c., for 96 years from Michaelmas day then last, at the yearly rent of a pepper corn for the first year, and at the rent of 42*l.* for the residue; *Crossland* and *Stonehouse*, at their own expense, before Lady-day then next, to erect twelve messuages as in

Where there is an ascertained debt from *A.* to *B.*, and an equal or larger debt from *C.* to *A.*, and all agree that *C.* shall be *B.*'s debtor instead of *A.*, and *C.* promises to pay *B.*; an action will lie upon such promise. *Secus*, if at the time of the promise the debt from *C.* to *A.* is unliquidated or incomplete.

(*a*) Counsel for the plaintiff, *F. Pollock* and *R. V. Richards*; for the defendant, *Scarlett*, A.G. and *Comyn*.

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the agreement mentioned, and to completely cover them in before Christmas-day then next; defendants and *Perry* to supply *Crossland* and *Stonehouse* with bricks, at prices in the agreement mentioned, the amount of such bricks to be sunk in the purchase of a rent-charge equal to 8*l.* per cent. per annum, to be charged upon each of the messuages, in addition to the rent of 42*l.*, and to purchase from *Crossland* and *Stonehouse* a further yearly rent-charge of 96*l.* to be charged upon each of the messuages, in addition to the rent of 42*l.*, for the sum of 1200*l.*, to be paid to *Crossland* and *Stonehouse*, or their order in writing, by six instalments, at different periods of the progress of the buildings." Pursuant to this agreement, *Crossland* and *Stonehouse* took possession of the ground, and the buildings were commenced. Soon afterwards, *Crossland* and *Stonehouse* having applied to the plaintiff to furnish them with timber for the houses, and having referred him to the defendants, a communication took place between the plaintiff and the defendants, when the latter refused to guarantee the payment by *Crossland* and *Stonehouse* for the timber; but undertook, if *Crossland* and *Stonehouse* gave the plaintiff orders upon them for the amount of timber supplied, to pay the plaintiff, so far as their instalments were due to *Crossland* and *Stonehouse*. The plaintiff accordingly supplied *Crossland* and *Stonehouse* with timber, for the payment of which they gave him written orders upon the defendants from time to time, and such orders were paid by the defendants to the plaintiff, to the amount of 772*l.* 14*s.* 6*d.*, which far exceeded the amount of instalments then due from the defendants to *Crossland* and *Stonehouse*. A balance of 233*l.* being still owing from *Crossland* and *Stonehouse* to the plaintiff, which neither they nor the defendants would pay, the present action was brought against the latter. It was contended for the defendants that as their debt to *Crossland* and *Stonehouse* was never extinguished, and as they had never actually received from *Crossland* and *Stonehouse* any money to the plaintiff's use, this action was not

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maintainable; and *Wharton* v. *Walker* (*a*) was cited as in point. It was answered for the plaintiff, that upon the authority of the last case upon the subject, *Spratt* v. *Hobhouse* (*b*), the balance of the debt from the defendants to *Crossland* and *Stonehouse*, was, under the circumstances of this case, to be considered, by construction of law, as money had and received by the defendants to the plaintiff's use. The Lord Chief Justice overruled the objection, but reserved the point, and the plaintiff obtained a verdict, with liberty for the defendants to move to enter a nonsuit (*c*). A rule nisi having been obtained accordingly,

F. Pollock and *R. V. Richards* shewed cause. If it appears from the course of dealing between these parties, that the defendants agreed to consider the money due from them to *Crossland* and *Stonehouse* as money had and received by them, the defendants, to the use of the plaintiff, there is nothing illegal in such an arrangement, and the defendants are liable in this form of action. It is not necessary that any money should actually pass; the legal effect of such an arrangement is the same as if the defendants had actually handed over the money to the plaintiff, and he had actually returned it to them. The case of *Spratt*, assignee of *Lynch*, v. *Hobhouse* (*d*), seems to be in point.

(*a*) 6 D. & R. 288; 4 B. & C. 163.

(*b*) 4 Bingh. 177.

(*c*) Looking at the various decisions upon this subject, the settled distinction appears to be this:—Where the original debt has been extinguished, that is, the debt owing from the defendant to the original creditor; or, where money has been actually received by the defendant on account of the plaintiff; there, the action for money had and received will lie: but, where the original debt has not been extinguished, and no money has been actually received, there that action will not lie. And the reason seems to be this, that in the latter case the defendant is still liable to be sued by his original creditor. From some of the cases it would also seem to follow, that where the original debt is extinguished, but no money has been actually received, the only remedy is by an action upon the special promise; though the last case of *Spratt* v. *Hobhouse*, 4 Bingh. 177, seems contrà. See *Comyn on Contracts*, 278.

(*d*) 4 Bingh. 177.

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There *Lynch*, who held the lease of a public-house, was indebted to the defendants in 1275*l.*, and had deposited his lease in their hands as a security. *Temprell*, who had 650*l.* in the defendants' hands, purchased *Lynch*'s lease for 1690*l.*, the defendants agreeing to advance him enough to make up the purchase money, on retaining the lease as a security. *Lynch*, *Temprell*, and the defendants' clerk met to complete the transfer, when *Temprell* drew a draft on the defendants in favour of *Lynch* for 1690*l.* The defendants' clerk received this draft, and on *Lynch*'s executing the transfer of the lease, gave him a draft on the defendants for 415*l.* On the evening of that day, *Lynch* having previously committed acts of bankruptcy, a creditor of his gave the defendants' clerk notice not to pay the draft, as a docket would be struck against *Lynch*. Another of the defendants' clerks in consequence refused payment when the draft was presented the next day, having also received a similar notice from the plaintiff, another creditor of *Lynch*'s. The defendants some days afterwards paid the draft to a banker, who presented it, but not till he had executed an indemnity. The plaintiff sued the defendants, as for money had and received to his use, and the jury were directed by *Best*, C. J., to find for the plaintiff, if they were of opinion that the arrangement made by *Temprell* and the defendants' clerk was equivalent to a passing of the money. The jury found for the plaintiff, and the Court held, after argument on a motion for a new trial, that the plaintiff, as the assignee of *Lynch*, was entitled to maintain the action, for money had and received, against the defendants. It will, however, be said, that this action is not maintainable, because the plaintiff here can only claim as assignee of *Crossland* and *Stonehouse*, and a chose in action is not assignable. Generally speaking, undoubtedly, that proposition is true; but it is clear, from recent decisions, that if in this case the plaintiff, *Crossland* and *Stonehouse*, and the defendants had agreed, that the defendants should become the debtors of the plaintiff for the sum due to him from *Crossland* and *Stonehouse*, the debt from *Crossland* and *Stone-*

house to the plaintiff would have been extinguished, and he would be entitled to sue the defendants for that amount. *Cuxon* v. *Chadley* (*a*), and *Wharton* v. *Walker* (*b*). Now there was evidence, at least sufficient to go to the jury, of such an agreement in this case. The plaintiff by lodging the orders for payment with the defendants, apprized them that he should consider them as his debtors for the sums mentioned in the orders. The defendants, by stating to *Crossland* and *Stonehouse* that they, the defendants, were responsible to the plaintiff for the sums mentioned in the orders, furnished evidence of a promise by themselves to pay the plaintiff the amount due to him from *Crossland* and *Stonehouse*, and of an agreement by the plaintiff to take the defendants as his debtors for that amount. Then, the debt from *Crossland* and *Stonehouse* became extinguished, and the extinguishment of that debt constituted a valid consideration for an undertaking by the defendants to pay the plaintiff. Besides, in this case, when the defendants had once admitted that they were responsible to the plaintiff, *Crossland* and *Stonehouse* had no power to revoke the order. *Hodgson* v. *Anderson* (*c*).

Scarlett and *Comyn*, contrà, were stopped by the Court.

Lord TENTERDEN, C. J.—We are all of opinion that the rule for entering a nonsuit in this case must be made absolute. The general rule of law is, that a debt cannot be assigned. There is, however, an exception to that general rule. It has been held, that where it has been admitted and agreed beyond dispute that a defined and ascertained sum is due from *A.* to *B.*, and that an equal or a larger sum is due from *C.* to *A.*, and the three agree that *C.* shall be debtor to *B.* instead of *A.*, and *C.* promises

(*a*) 5 D. & R. 417; 3 B. & C. 591.

(*b*) 6 D. & R. 288; 4 B. & C. 163.

(*c*) 5 D. & R. 735; 3 B. & C. 842. And see *Metcalf* v. *Clough*, *ante*, 178.

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to pay *B.* the sum owing to him from *A.*, an action may be maintained by *B.* against *C.* (*a*). In the present case there was no defined or ascertained sum admitted or agreed to be due from the defendants to *Crossland* and *Stonehouse*, at the period when the former are supposed to have acknowledged that they were responsible to the plaintiff. *Crossland* and *Stonehouse* applied to the defendants for a further advance, which the defendants refused, because they held orders in favour of the plaintiff for the payment of more than 200*l.* But there was no evidence to shew that that particular sum was then due from the defendants to *Crossland* and *Stonehouse;* it might only have been to become due at some future period by the completion of the work then in progress. It was for the plaintiff to bring himself within the exception to the general rule, by shewing clearly that at the time when the defendants are supposed to have promised to pay him the debt owing to him from *Crossland* and *Stonehouse*, there was a debt ascertained and admitted to be owing from the defendants to *Crossland* and *Stonehouse*. This he has not done; and therefore he has not brought himself within the exception to the general rule, and cannot maintain this action.

Rule absolute to enter a nonsuit (*b*).

(*a*) "If *A.* owes *B.* 100*l.*, and *B.* owes *C.* 100*l.*, and the three meet, and it is agreed between them that *A.* shall pay *C.* the 100*l.*; *B.*'s debt is extinguished, and *C.* may recover that sum against *A.*" Per *Buller*, J., in *Tatlock* v. *Harris*, 3 T. R. 180. This appears to be laid down without reference to an express promise; and query whether a promise is not necessarily implied from the nature of the transaction. And see *Wilson* v. *Coupland*, 5 B. & A. 228; *Hodgson* v. *Anderson*, 5 D. & R. 741, 746.

(*b*) Expromissores autem qui dicuntur, fidejussores non sunt, quia idem cum alio non promittunt nec obligationi alienæ accedunt: sed expromissione fit novatio. Nam expromittere et expromissor in usu juris is dicitur qui alienam obligationem in se suscipit liberato reo. Vinn. Comm. lib. 3, tit. 21, de fidejussoribus; and see Pothier, Obligations, No. 601.

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Special facts rendering valid a deferred notice of dishonour will support the common averment of notice.

An indorsee not knowing the indorser's address, employs his attorney to discover it and give notice of dishonour. The attorney discovers the address one day, consults his client the second, and gives notice the third:—Held, a valid notice.

Semble, that an agent to indorse, is also agent to receive notice of dishonour.

ASSUMPSIT by the indorsee against the indorser of a bill of exchange. Plea, non assumpsit, and issue thereon. At the trial before Lord *Tenterden*, C. J., at the London Adjourned Sittings after Trinity Term, 1827 (*a*), the due presentment of the bill, its dishonour, and the defendant's indorsement upon it, were admitted; and the only question was, whether due notice of the dishonour had been given to the defendant, or due diligence used by the plaintiff to serve him with such notice, so as to satisfy the allegation of notice in the declaration. The circumstances were these:—The plaintiff, a bill broker in London, took the bill in payment of a debt from Messrs. *Swaine* and Co., to whom it had been paid by one *Major*, who had previously indorsed the bill in the name of the defendant, by his permission. The defendant was an innkeeper at Bruton, in Somersetshire. The bill was dated Frome, which is also in Somersetshire, but distant ten miles from Bruton. The bill became due on the 4th of August, 1826, and upon its being dishonoured, the plaintiff immediately sent notice of that fact to the defendant by a letter, directed to him at Frome. This letter did not reach the defendant; but after remaining a month, the usual period, at the Frome Post-Office, was returned from thence to the General Post-Office in London, and from thence to the plaintiff, whom it reached on the 25th of September. *Major*, who had indorsed the bill for the defendant, had immediate notice of its dishonour, but did not communicate the fact to the defendant; and he also knew the place of the defendant's residence, but refused to communicate it to the plaintiff. On the 16th October, the plaintiff's attorney first received information of the defendant's residence; on the 17th he communicated it to the plaintiff, and consulted with him

(*a*) Counsel for the plaintiff, *Scarlett*, A.G., and *Barnewall*; for the defendant, *Brougham* and *Chitty*.

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what was to be done; and on the 18th he sent the defendant notice of the dishonour, and demanded payment of the bill. Neither of those days fell on a Sunday. Under these circumstances it was contended, on the part of the defendant, first, that the notice to *Major* was not in law notice to the defendant, and therefore that there was no *due* notice of the dishonour to the defendant in the first instance; secondly, that the notice on the 18th of October was too late, for the defendant's residence having been discovered on the 16th, the notice ought to have been sent at latest on the 17th; and, thirdly, that even if the latter notice was sufficient in itself, still the averment of notice in the declaration, which was in the ordinary form, was at variance with it, and ought to have been so framed as to meet the peculiarity of the case, by setting out the real facts respecting the notice.

Lord TENTERDEN, C. J.—At present I am inclined to think that as the defendant authorized *Major* to indorse the bill for him and in his name, *Major* must be considered as the defendant's agent in the transaction; and that as he knew both of the dishonour of the bill and the place of the defendant's residence, the first of which he concealed from the defendant, and the latter from the plaintiff; notice to him must be considered notice to the defendant. I am also inclined to think that the lapse of a day between the 16th of October, when the plaintiff's attorney ascertained the place of the defendant's residence, and the 18th, when he sent him actual notice of dishonour, was, under all the circumstances of this case, immaterial; for the attorney had, in my opinion, a right to take the intermediate day to see and consult his client. Such a delay in the first instance would have been fatal perhaps, because a prompt notice is essential upon the first intelligence of the dishonour of a bill; but after the unavoidable delay and difficulty occasioned by the plaintiff's ignorance of the defendant's residence, extreme promptitude is not so im-

portant or necessary. I am also inclined to think the averment of notice in the declaration sufficient, and that it was not necessary in such a matter to set out all the special facts in pleading.

His lordship having thus delivered his opinion, directed the jury to find a verdict for the plaintiff, which they did accordingly. In Michaelmas Term last a rule nisi was obtained to set aside the verdict, and to enter a nonsuit, against which

Sir *J. Scarlett* and *Barnewall* shewed cause. The defendant ought not to complain of the verdict against him; for he has received two several good and sufficient notices of the dishonour of the bill. He chose to employ *Major* as his agent to indorse the bill for him in the first instance; and by so doing he made him his agent through the whole transaction respecting the bill; consequently, notice to *Major* was notice to him, and it is admitted that *Major* had due notice. Independently of that, the notice on the 18th of October was in good time. The defendant's address was ascertained only on the 16th; and sending him notice on the 18th was using all reasonable and necessary diligence. Then, supposing the plaintiff is driven to rely on this second notice, he was not bound to set out the special circumstances attending it in his declaration. There is no express authority upon this point, one way or the other; it does not appear ever to have been decided. The only case upon the subject (*Cory* v. *Scott* (*a*),) is cited in Mr. Justice *Bayley*'s Treatise on Bills (*b*), where that learned judge says, apparently upon the authority of that case, "Under an allegation of notice, it may be questionable whether evidence can be given of facts to excuse notice, or whether, to let in such evidence, the facts should not be specially pleaded:" but the case contains no decision, nor any strong opinion upon the point, one way or

(*a*) 3 B. & A. 619.

(*b*) *Bayley* on Bills, 329.

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the other (a). Upon general principles a special averment does not appear necessary; and in this case the special facts were not proved as an excuse for want of notice, for there was a good previous notice to the defendant through his agent.

Brougham and *Chitty*, contrà. The averment that the defendant had notice, must be construed to mean that he had prompt and regular notice; notice at that period at which by law notice ought, ordinarily, to be given. Now the evidence in the case was, not of such regular notice, but of certain circumstances which, it was contended, formed an excuse for the want of such regular notice. There was a variance, therefore, between the averment and the proof. The plaintiff, in order to meet the difficulties and peculiarities of his case, ought to have set out in his declaration the circumstances on which he relied as forming

(a) The decision in *Cary* v. *Scott* is reported thus:—"Where a bill was drawn and accepted for the accommodation of an indorsee, who, as well as the drawer, had no effects in the hands of the acceptor:—Held, that a subsequent indorsee, in order to entitle himself to recover in an action against the drawer, was bound to give notice of the dishonour, as the drawer might have called on the acceptor, or the previous indorsee, for payment, if he had had such notice:" not in the least, certainly, touching the question of pleading and evidence involved in the principal case. In *Chitty* on Bills, 466, 5th ed., it is said, "In an action against the drawer or indorser of a bill, it is a most material averment that the defendant had notice of the dishonour of the bill, or some excuse must be *alleged* for the neglect to give such notice, and an error in this respect will be fatal after verdict." This position appears to be perfectly correct. The declaration, in order to trace the defendant's liability, and raise a consideration for the alleged promise and undertaking, must shew either that he had notice of dishonour or that he had disqualified himself from claiming that to which he was *primâ facie* entitled. Want of assets, or other circumstances which dispense with an actual and formal notice, would seem to amount to an implied or a constructive notice, sufficient to satisfy a general allegation of notice, though capable of being stated specially on the record. But where the party has had actual notice, and the only question is, whether that notice was given within a reasonable time, there appears to be no more reason for setting out the special circumstances on the record, than for stating at what hour the post goes out on the second day in an ordinary case.

an excuse for the want of the usual notice. *Cory* v. *Scott*(*a*). But the notice, as proved, was not in itself sufficient. Admitting that the plaintiff, while the bill was running due, and after it had become due, used due diligence to ascertain the place of the defendant's residence, still, he did not give notice to the defendant within a reasonable time after he had ascertained where he might be found. The plaintiff's attorney was informed of the defendant's place of residence on the 16th, but did not send him notice till the 18th. He might and ought to have sent the notice on the 17th; and his omitting to do so was laches on the part of the plaintiff. On that ground, therefore, the plaintiff is not entitled to recover.

Lord TENTERDEN, C. J.—I am clearly of opinion that the allegation in the declaration that the defendant had notice of the dishonour of the bill, was abundantly supported by proof that he had a notice, good and available in law; and that it was quite unnecessary to set out upon the record the particular facts and circumstances which rendered the notice valid, although it was given at a later period than would, in ordinary cases, have sufficed. The objection to the form of the declaration, therefore, being removed, the only question is, whether the notice of dishonour was valid or not. I thought at the trial that as the defendant had made *Major* his agent for the purpose of indorsing the bill, he had also made him his agent for the purpose of receiving notice of the dishonour, and, consequently, that notice given in due time to *Major*, was notice given to the defendant. I still incline to the same opinion; but it is not necessary to decide the case upon that ground, and I prefer to decide it upon higher and more general principles. For more than a month the defendant's address was unknown. Up to the 24th of September the holder was clearly not guilty of any laches: he had inquired

(*a*) 3 B. & A. 619. See the last note.

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the defendant's address both of *Major* and of his attorney, and was unable to obtain any information. The bill purported to have been drawn at Frome, and to that place the plaintiff sent notice of its dishonour. The letter conveying that notice was returned to *Pownal*, the plaintiff's attorney, on the 24th of September, and he thereupon wrote to an attorney at Poole, instructing him to ascertain and furnish him with the defendant's address. On the 16th of October, he was furnished with the defendant's address. If he had sent the defendant a notice on the 17th, it is not disputed that that would have been in sufficient time; but he did not send it till the 18th; and thus the question is, whether he was justified in taking the intermediate day to consult his client. *Pownal* was not the holder of the bill; he was the agent and attorney of the plaintiff, employed by him to give notice of the dishonour. If *Pownal*, as the agent of the plaintiff for the purpose of giving notice of dishonour, was entitled to take a day to consult his client under the peculiar circumstances of the case, the notice was sufficient; and I am of opinion that he was so entitled. If the letter furnishing the defendant's address had been sent to the plaintiff himself, as principal, he would have been bound to send notice to the defendant on the next day; but as it was sent to *Pownal*, as the agent, I think he was not bound to send the notice on the next day. A banker, who holds a bill for a customer, is not bound to give notice of the dishonour on the very day the bill is dishonoured (*a*); and, upon the same principle, I think the attorney in this case was by law entitled to take a day for the purpose of consulting his client. For these reasons I am of opinion that the plaintiff is entitled to recover, and that this rule ought to be discharged.

(*a*) A banker is considered as a distinct holder, even when possessed of the bill merely for the purpose of receiving the amount for his customer. See *Robson* v. *Bennett*, 2 Taunt. 388; *Langdale* v. *Trimmer*, 15 East, 291; *Scott* v. *Lifford*, 1 Campb. 249, 9 East, 347; *Haynes* v. *Birks*, 3 B. & P. 599.

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BAYLEY, J.—I am of the same opinion, and I entirely concur in the view of the case taken by my Lord Chief Justice. The cases of bankers are analogous to the present. Where a bill is deposited with a banker for the benefit of his customer, the banker has a day to give notice of the dishonour to his customer. The banker is only bound to give the same notice to his customer as if he were himself the holder, and his customer must send to the party entitled to notice; and the customer has the same time to communicate such notice as if he had received it from a holder (*a*). The principle of those cases is decisive of the present.

HOLROYD, J. concurred.

LITTLEDALE, J.—I am of opinion that the notice in this case was sufficient, for the reasons already given by the Court. I am also of opinion that the averment of notice in the declaration was sufficient in itself, and was sufficiently proved. *Bateman* v. *Joseph* (*b*) is an authority upon this point. That was an action by the indorsee against the payee and first indorser of a bill of exchange. The plaintiff received notice of the dishonour on the 30th of September, in time to have given notice on that day. He did not give notice until the 4th of October, but his clerk proved that he did not ascertain the defendant's place of abode until that day. Lord *Ellenborough* there said, "the holder must not allow himself to remain in a state of passive and contented ignorance; but if he uses reasonable diligence to discover the residence of the indorser, I conceive that notice given as soon as this is discovered, is due notice of the dishonour of the bill, within the usage and custom of merchants:" and he left it to the jury to find for the plaintiff, if they thought he had used reasonable diligence to discover the residence of the indorser (*c*). In this case, I think, no one can doubt that reasonable diligence

(*a*) See the last note.

(*b*) 2 Campb. 461; 12 East, 433.

(*c*) But in *Sturges* v. *Derrick*, Wightw. 76, what is reasonable notice under a given state of facts was held to be a question of law.

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was used for that purpose. If the notice, under the peculiar circumstances of the case, was a valid notice at the time it was given, the allegation is supported by the evidence. I think it was quite unnecessary that the special circumstances excusing the want of notice at the time when notice is usually required, should be set out in the declaration; and in all my experience I never recollect seeing such a statement made. It is sufficient in pleading to state the legal effect (*a*); and the legal effect of the special circumstances in this case was to make the notice given on the 18th of October a valid notice.

Rule discharged (*b*).

(*a*) Com. Dig. Pleader, C. 37; 1 Wms. Saund. 235 b. (9); 2 Wms. Saund. 97 b. (2).

(*b*) And see *Sturges* v. *Derrick*, Wightw. 76.

HAYWARD *v.* WRIGHT.

A cause remanded to an inferior Court by procedendo, cannot be again removed into this Court upon the ground of its alleged importance.

THIS action had been commenced in the Palace Court, and removed into this Court by Habeas Corpus, but the defendant not having justified bail in due time, a procedendo had been awarded. A rule nisi for quashing the procedendo having afterwards been obtained, upon an affidavit stating that the cause was of importance, and proper to be tried in this Court,

Thesiger now shewed cause, and cited the statute 21 Jac. 1, c. 23, s. 3, as decisive against the application, it being thereby enacted that no cause which has been once removed from and remanded to an inferior Court, shall be again removed.

F. Pollock, contrà, endeavoured to support the rule upon the affidavit of the importance of the cause, offering to bring the money into Court, and contending that the statute was intended only to prevent abuses in the removal of trifling causes, and did not apply to cases where the question to be tried was really of importance.

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HAYWARD v. WRIGHT.

Lord TENTERDEN, C. J.—I think we cannot venture to make this rule absolute. There is a fixed and regular course which a party must pursue in order to remove his cause from an inferior Court. The defendant might have retained the cause in this Court, if he had observed the regular course of proceeding, and performed what the statute requires. But he failed to do so; and he has thereby lost the benefit of his first proceeding, and the plaintiff has gained the right of removing back the cause into the inferior Court. We are now asked by the defendant to go out of the regular course, on account of the supposed importance of the cause, which renders it more proper to be tried here than in the Court below. It would be novel and dangerous to listen to such an application; it would be opening a door to numerous applications founded on slight grounds and of a similar nature; and this Court would be constantly importuned to try the merits of a case on affidavits. I think the rule must be discharged.

HOLROYD, J.—I do not remember ever to have heard of such a motion as this. I think it would be highly improper to grant it. The Court never goes out of the fixed course of proceeding in cases like the present. It is the invariable practice to refuse to give time for putting in or perfecting bail, where a cause has been removed from an inferior Court.

Rule discharged.

EVANS v. WHITEHEAD and GOLDBY.

Upon a writ against two, a declaration against one only is good; but notice of such declaration entitled as against both, is bad.

CHITTY had obtained a rule calling upon the plaintiff to shew cause why the writ and all subsequent proceedings, or why the notice of declaration and all subsequent proceedings, should not be set aside for irregularity, with costs. It appeared by the affidavits, that the writ, which was a non-bailable process, was against both the defendants; common bail had been put in for *Whitehead*, and the decla-

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ration was against him *only;* but the notice of declaration which had been served on him was entitled as against *both* defendants, and was, "Take notice that a declaration has been filed against *you*," &c. No common bail had been put in for *Goldby*.

Carrington shewed cause. There seems to be no ground for setting aside the writ or the declaration. The writ is in the usual form, and by the practice of this Court a party may sue out a non-bailable writ against two, and declare against one only. It is true that the notice of declaration is inaccurate, but still it is not calculated to deceive or mislead, because if the defendant *Whitehead* has notice that a declaration is filed against him, it is not very material to him whether he is at the same time informed of a declaration being filed against some other person also.

Chitty, in support of the rule, cited and relied upon the rule of Court of E. T. 1827 (*a*), as decisive to shew that the declaration was irregular.

Lord TENTERDEN, C.J.—If the plaintiff had filed two separate declarations against these two defendants, that would clearly have been irregular under the rule of Court referred to; but I am decidedly of opinion that a plaintiff may sue out his writ against two defendants, and declare against one only, dropping his proceedings against the other entirely. The notice of declaration, however, is certainly bad, and the service of it must be set aside; but, under the circumstances of this case, without costs on either side.

Rule accordingly.

(*a*) Which recites, that doubts had arisen in practice as to the number of defendants' names to be inserted in mesne process in actions by bill, and orders, that from and after the last day of that Term, "in all actions by bill, the mesne process shall contain the name of the defendant, or (if more than one) of all the defendants in that action; and shall not contain the name or names of the defendant or defendants in any other action."

1828.

TEAGUE *v.* HUBBARD.

ASSUMPSIT upon two bills of exchange for 200*l.*, and 133*l.*, the former dated 1st April, 1826, at two months, the latter 12th April, 1826, at one month, both drawn by defendant, payable to his own order, upon and accepted by one *Richard Conness*, and both indorsed first by the defendant to one *William Meares*, and afterwards by *Meares* to the plaintiff; with the money counts. Plea, *non assumpsit*, and issue thereon. At the trial before Lord *Tenterden*, C. J., at the London adjourned sittings after Trinity term, 1827,(*a*) the case was this:—The plaintiff, the defendant, and *Meares*, were all members and shareholders of a joint stock company, called "The Cornish Tin Smelting Company." *Meares* was "actuary" to the company, the plaintiff was the "chief acting manager," and the defendant was their agent for the sale of their tin in London, which he sold upon a *del credere* commission. The defendant having sold tin on behalf of the company to the amount of the bills in question, drew those bills on *Conness*, the purchaser; which being accepted by *Conness*, and indorsed by the defendant to *Meares* the actuary, were sent by the defendant to *Meares*, who indorsed them to the plaintiff; who, upon their being dishonoured by the acceptor, commenced the present action against the defendant on account of the company. In drawing the bills, the defendant wrote his name "*Zach. Hubbard*, for Cornish Tin Smelting Company." In indorsing them he merely wrote his name, "*Zach. Hubbard.*" *Meares* indorsed the bills as "Actuary for Cornish Tin Smelting Company." Notice of the dishonour of the first bill only was proved, but it was proved that the defendant had admitted receiving from *Conness*, the acceptor, 10*s.* in the pound on the bills, on account of the company, which he obtained in consequence of having, as

B., a member of a joint stock company, and their agent, sells their goods on a *del credere* commission to *A.* *A.* accepts bills payable to the order of *B.*, which he indorses to the actuary of the company, who indorses them to *C.*, *another member*. *A.* failing before the bills are due, pays *B.* 10*s.* in the pound on account of the bills:—*B.* is not liable to *C.* on the bills, or for money received to his use.

(*a*) Counsel for the plaintiff, *Campbell* and *Chitty*; for the defendant, *F. Pollock* and *Follett*.

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agent and joint proprietor of the company, executed a power of attorney to sue *Conness* in America. Upon this evidence it was contended for the defendant, that the plaintiff and himself being both members and shareholders of the company, on whose account the bills were drawn, must in construction of law be considered as partners, and consequently that this action by one partner, indorsee, against another partner, indorser, of bills of exchange, could not be maintained. The Lord Chief Justice overruled the objection, but reserved the point, and the plaintiff obtained a verdict for the amount of the first bill, and of the composition received by the defendant upon the second, with liberty to the defendant to move to enter a nonsuit. In Michaelmas term last a rule *nisi* was obtained accordingly by *F. Pollock*, who referred to the distinction taken by Lord *Ellenborough* in *Leadbetter* v. *Farrow* (*a*).

Campbell and *Chitty* now shewed cause. There is no ground for disturbing the verdict. When the defendant indorsed the bills, he rendered himself liable upon them in his individual and personal character. The bills were drawn payable to his own order, and he must be taken to have indorsed them for himself individually. His describing himself as agent to the company when he drew the bills, would not relieve him from liability if the bills passed to third persons unconnected with the company; and his omitting that description of himself when he indorsed the bills shews that he intended them to pass generally. The consideration for the bills was money due from the defendant to the company in his character of their agent; and the mere fact of his being also a member of the company did not render it impossible for him to divest himself of his partnership character, and to take upon himself, as he has done, a personal liability. *Bishop* v. *Hayward* (*b*) will be relied on by the other side; but that case was decided upon a very different point, and does not affect the present question. There *A.* sued *B.* upon a promissory note made

(*a*) 5 M. & S. 349. (*b*) 4 T. R. 470.

by *C.* to *A.*, indorsed by *A.* to *B.*, and indorsed back by *B.* to *A.*; and having obtained a verdict, the judgment was arrested, upon the ground that such a proceeding led to a circuity of action, which the law abhors. But the verdict in this case leads to no such consequence, and the defendant here was indebted in his individual character, and in that character indorsed the bills. At all events, the plaintiff was entitled to recover upon the count for money had and received; for the defendant had received 10*s.* in the pound upon the debt owing to the company, which he received as their agent, and upon a *del credere* commission.

F. Pollock and *Follett*, contrà. The *del credere* commission has no bearing upon the question now before the Court. That question is, whether the contract arising out of the bills of exchange was made by the defendant in his individual character, or in his character of partner, or member of a company. The partnership, or company, so far as appears, consisted of no more than the plaintiff, the defendant, and *Meares*. The defendant drew the bills payable "to my order." That must be taken to mean the order of the partnership or company, or the order of the defendant as their agent; not as his order in his individual character: because the debt was owing, not to him, but to them. It is evident from the whole transaction that the bills were drawn on account of the partnership, for they were given for the price of goods belonging to the partnership, sold to the acceptor by the defendant, and were indorsed by him to *Meares*, the actuary, and a member of the partnership, and by him, in that character, to the plaintiff. Then, if the plaintiff was acting as one of the partnership, as he clearly was, the whole firm are liable, *Pinkney* v. *Hall* (*a*), *Smith* v. *Jarves* (*b*), *Lord Galway* v. *Mathew* (*c*); and if the bills were drawn by the firm, as they clearly were, the plaintiff, as one of that firm, cannot

(*a*) 1 Ld. Raym. 175.
(*b*) 2 Ld. Raym. 1484.
(*c*) 1 Campb. 403; 10 East, 264.

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sue his partner upon them, whatever may be the mode in which he became entitled to them. *Mainwaring* v. *Newman* (*a*), *Moffatt* v. *Van Millingen* (*b*), *Neale* v. *Turton* (*c*). [Lord *Tenterden*, C. J. Admitting that the bills were drawn by the firm, and consequently that the plaintiff cannot sue the defendant on the bills, still, if the defendant, as one of the firm, has guaranteed a debt to the firm, and has received part of it from the debtor, may not the other partners recover against him for the money so received? May not the plaintiff say that the money received by the defendant on account of the bills was received by him, not as a partner, but in his individual character, and for the purpose of relieving himself, *pro tanto*, from his liability to the firm upon his guarantee? Though the plaintiff may not be entitled to recover on the bills, by reason of the partnership, may he not recover the sum actually received by the defendant, the receipt of that sum not being a partnership transaction? (*d*)] It is submitted that he cannot. The defendant received the money as the agent of all the partners, of whom the plaintiff was one; the defendant, therefore, is not liable to the plaintiff, being his partner, for money received by him on account of the partnership.

Cur. adv. vult.

Judgment was now delivered by

Lord TENTERDEN, C. J.—This was an action against the defendant as the drawer of certain bills of exchange, and for money had and received to the use of the plaintiff.

(*a*) 2 B. & P. 120.

(*b*) 2 B. & P. 124, n.

(*c*) 4 Bingh. 149.

(*d*) See *Coffee* v. *Brian*, 3 Bingh. 54. There, *J.*, *T.*, and *B.*, were jointly concerned in the sale of butters. *J.* consigned them to *B.*, who sold them on the joint account. *T.*, being requested to accept bills for the firm, refused to do so without some security, when *B.* engaged, if *T.* paid the bills, to repay him out of the proceeds received for butters already sold. *T.* accepted and paid the bills, and it was held that he might sue *B.* for money had and received to his use.

The bills were signed by the defendant, were indorsed by him to one *Meares*, the actuary of a joint stock company, and by *Meares* to the plaintiff. Notice of the dishonour of the second of these bills was not proved, but it was proved that the defendant had received 10*s.* in the pound on account of both from the acceptor, and in respect of the second bill the plaintiff had a verdict on the count for money had and received. It was also proved that both the plaintiff and the defendant were members of the joint stock company. It follows from this state of facts, that if the plaintiff could recover against the defendant on the bills, it would be a recovery by one joint contractor against another, and that the defendant would have a right to sue the plaintiff for contribution. It is, therefore, clear that the plaintiff cannot maintain this action upon the bills; but I thought, both at the trial and at the time of the argument, that a verdict might, under these circumstances, be sustained on the count for money had and received. Upon further consideration, however, we are all of opinion that the defendant must be considered as having received the money, not in his individual character, but in his character of partner; and that being the case, if the plaintiff could recover it at all in this action, the consequence I have pointed out would follow, the defendant would have the same right to sue the plaintiff for contribution, as if the verdict had been taken upon the count framed on the bills. Upon this ground we are of opinion that this action cannot be maintained at all, and that the rule for entering a nonsuit must be made absolute.

Rule absolute.

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In re WASHBOURN.

Where a creditor obtains judgment by *nil dicit* against his debtor, whose goods are seized by the sheriff before his bankruptcy, but not sold till after it, the Court will not compel the sheriff to pay over the proceeds of the sale to the assignees, although the validity of the commission be not impeached.

JOHN WASHBOURN and his father carried on business as partners at Gloucester, and being indebted to *Thomas Washbourn*, they, on the 2d of April, 1824, executed a warrant of attorney to confess a judgment by *nil dicit* against them for 6200*l.*, subject to a defeazance that execution should not issue unless default were made in payment of 3100*l.* to *Thomas Washbourn* on the 2d of October following. *Thomas Washbourn* died on the 4th of May, 1824, at which time no part of the 3100*l.* had been paid. *John Washbourn* and his father continued to carry on their business, and on the 25th of January, 1828, the sheriffs of the city of Gloucester took possession of all their partnership effects, under a writ of *fi. fa.* upon a judgment previously entered up on the warrant of attorney by the executor of *Thomas Washbourn*. While the sheriffs continued in possession of the goods, *John Washbourn* and his father committed acts of bankruptcy, and on the 5th of February, 1828, a commission of bankrupt issued against them, under which they were duly declared bankrupts, and *D. Mowbray* and and *W. B. Whitaker* were duly appointed assignees. A few days before the commission issued, the under-sheriff of the city of Gloucester received notice that *John Washbourn* and his father had committed acts of bankruptcy, and that a docket had been struck against them; notwithstanding which the sheriffs, on the 26th of February, sold the goods, the proceeds of which amounted to 1080*l.*

Campbell having obtained a rule calling upon the sheriffs to shew cause why they should not pay over to the assignees the 1080*l.*, on the ground that the goods being unsold when the act of bankruptcy was committed, had vested in the assignees by virtue of the bankrupt act, 6 *Geo.* 4, c. 16, s. 108,

W. E. Taunton now shewed cause. The Court will not

decide so important a question as that now pending between these parties, in a summary way on motion. It is at present at least doubtful whether the assignees will ultimately shew themselves entitled to the proceeds of the goods sold under the execution. The goods were seized before the act of bankruptcy, although they were not sold till after it, and therefore up to the passing of the last bankrupt act, 6 *Geo.* 4, c. 16, the act of bankruptcy would not have affected the goods so seized. *Cole* v. *Davies* (*a*). Now the 108th section of that statute enacts, "that no creditor having security for his debt shall receive upon such security more than a ratable part of such debt, except in respect of any execution or extent served and levied by seizure upon any part of the property of such bankrupt before the bankruptcy;" and in this case there was an execution levied by seizure upon the goods of the bankrupt before the bankruptcy. The latter part of the same section does indeed provide, in terms somewhat inconsistent and irreconcilable with the enacting part, "that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid ratably with such creditors." But it has not yet been decided that a creditor who has obtained judgment by default, &c., and has levied by seizure, is deprived of the benefit of his execution by force of that proviso; and in *Wymer* v. *Kemble* (*b*), where the goods had been seized and sold to the execution

(*a*) 1 Ld. Raym. 724, where it was held, that if the goods of *A.* be seized upon a *fi. fa.* issued upon a judgment obtained against *A.*, and after the seizure *A.* becomes bankrupt, this act of bankruptcy cannot affect the goods so levied in execution. It is said, that a teste or delivery to the sheriff before the bankruptcy of a debtor, of a writ of *fi. fa.* is not a sufficient service and execution to raise a lien: but a seizure by the sheriff upon a writ of *fi. fa.* before the bankruptcy of the debtor is a valid service and execution, and gives the creditor a lien on the goods. Mont. B. L. 246. And see Mann. Exch. Pract. 2d edition, 44, 47, (*x*).

(*b*) 6 B. & C. 479.

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creditor, it was held, that after the sale he was not a creditor having security for his debt, within the meaning of the 108th section. This point, therefore, being doubtful, the Court will not in this summary way compel the sheriff to pay over the money to the assignees, but will leave them to their regular remedy by action. It has never been the practice for the Court to interpose in this manner. If this rule be made absolute, the sheriff may be placed in a situation of great hardship and difficulty, for it may happen that after he has paid over the money to the assignees the commission may be superseded. If the Court interpose their summary jurisdiction in the present case, they may be called upon to do so by the assignees in every case where judgment has been obtained after verdict. In *Taylor* v. *Taylor*(*a*) it was held, that an execution issued upon a judgment obtained by default, confession, or *nil dicit*, and levied upon the goods of a bankrupt before his bankruptcy, was not *void*, and this Court refused to set aside such an execution on motion by the assignees.

Campbell, contrà. There is no real difficulty or inconsistency in the 108th section. The true construction of it appears to be this:—Where the judgment is obtained after verdict, the creditor is entitled to the goods, if they were seized before the bankruptcy; but where the judgment is obtained by default, confession, or *nil dicit*, he is not entitled to the goods, unless they have been sold, as well as seized, before the bankruptcy. This was the construction contended for on the part of the plaintiff in *Wymer* v. *Kemble*, and it was declared by Lord *Tenterden*, C. J., in pronouncing his judgment in that case, to be a reasonable construction. It follows from that, that the assignees in this case are entitled to the money produced by the sale of the goods; and as it was decided in *Notley* v. *Buck* (*b*), that it is the duty of the sheriff in such case to pay over the

(*a*) 8 D. & R. 159; 5 B. & C. 592.

(*b*) *Ante*, 68; 8 B. & C. 160.

money to the assignees, to whom it does belong, and not to the execution creditor, to whom it does not belong, the Court will interfere to compel the sheriff to perform his duty, where justice requires that he should do so. It cannot be presumed that the commission is invalid, and liable hereafter to be superseded; on the contrary, as the execution creditor has had the opportunity of impeaching the commission by affidavit, and has not done so, the presumption is that the commission is regular and unimpeachable. That being so, the sheriff cannot be prejudiced by this rule being made absolute; and the execution creditor may be benefited by it; for if the sheriff were to pay over the money to the execution creditor, the assignees might recover it from him in an action for money had and received, the costs of which he would be liable to pay.

Lord TENTERDEN, C. J. — It seems to me that our safest course will be to discharge this rule. If we were to make this rule absolute, it is impossible to say to what extent we might be called upon to interpose a summary jurisdiction in similar cases. We have been urged to do so, upon the ground that the execution creditor has not suggested upon affidavit any objection to the validity of the commission. But there may be objections to the validity of the commission, which may either be unknown to him at present, or which he may deem it imprudent at present to disclose. Upon the whole, I think it safest to discharge the rule.

The other Judges concurred.

Rule discharged. (*a*)

(*a*) And see *Morland* v. *Pellatt*, *post*.

1826.

The KING *v.* The JUSTICES of BERWICK-UPON-TWEED.

The borough of Berwick-upon-Tweed is within the purview of 55 *Geo.* 3, c. 51, s. 24; and the justices may make a rate, in the nature of a county rate, upon the borough.

THIS was a rule for a certiorari to remove into this Court a rate made, and all proceedings had for the collection of the same, by the defendants, for the purpose of their being quashed. The affidavits disclosed the following facts. The justices of Berwick-upon-Tweed, in sessions assembled, had made an assessment in the nature of a county rate upon the *borough*, and had ordered it to be levied upon the *parish*, which is coextensive with the *borough*; for which purpose they had issued their precept, directed to the high constable of the *borough*, commanding him to issue his warrant to the churchwardens and overseers of the *parish*, requiring payment of the sums assessed. The borough of Berwick-upon-Tweed is not a county of itself, although it has for many purposes a separate jurisdiction. It was formerly part of Scotland, and one of the royal burghs of that kingdom. The borough and the liberties extend three miles to the west and to the north of the town, and comprise together a tract of country containing about eleven miles. It is bounded on the west and the north by Scotland, on the east by the German ocean, and on the south by the river Tweed; the south looking towards the county of Durham (*a*), in England. The borough is an ancient borough, and is regulated by a charter of incorporation granted by King *James* the First, by letters patent, which were confirmed by Act of Parliament. The charter appointed a mayor, aldermen, justices of the peace, of oyer and terminer and of general gaol delivery, bailiffs, and a coroner, and gave the usual powers for filling and for discharging the duties of those offices. It also granted to the corporation the seigniory, manor, borough, town and soke of Berwick-upon-Tweed, and certain lands commonly called the bounds and fields of Berwick, and certain other lands, to the only proper use and behoof of the mayor, bailiffs and burgesses of the

(*a*) i. e. a detached part of that county, lying north of Northumberland.

borough, and their successors, in fee, for ever. It provided also for a borough gaol, and for the administration of justice according to the laws of England. It gave the usual power for making rates and assessments for the good state and maintenance of the borough. The corporation are possessed of very considerable annual funds, out of which they have from time to time disbursed sums towards objects of public utility. They have also applied a part to the sustenance of the widows of decayed burgesses; and have always heretofore paid the coroner's salary, the fees for taking inquisitions, the gaoler's salary, the expenses of erecting and repairing the gaol, and of maintaining the prisoners, the expenses of prosecuting felons, (those of the constables excepted), of conveying convicts to the place appointed by the secretary of state in order for transportation, and of providing the standard weights and measures. No rate in the nature of a county rate has ever before been made in the borough. The object of the rate in question is the erection of a House of Correction within the borough (*a*).

F. Pollock and *Ingham* shewed cause against the rule. The question of the validity of this rate depends upon the construction which the Court shall think proper to give to the statute, *55 Geo.* 3, c. 51, s. 24 (*b*); that is, whether

(*a*) A question was made, both in the affidavits, and in argument, whether the corporation had or had not funds at their command sufficient for, and properly applicable to, the purpose for which the rate was made, independently of any rate; but as the judgment of the Court did not, in any degree, proceed upon that point, it is thought inexpedient to introduce it into the report of the case.

(*b*) Which enacts, "that where any ridings or divisions have separate commissions of the peace, or where any cities, towns, or other places, within that part of Great Britain called England, have commissions of the peace within themselves, and are not subject to the jurisdiction of the commissions of the peace for the counties at large in which such liberties or franchises lie, and do not, nor did before the passing of this act, contribute or pay to the several rates made for the said counties at large, it shall and may be lawful to and for the justices of the peace of such separate jurisdictions, within

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the town and borough of Berwick-upon-Tweed is a separate jurisdiction *within England*, within the meaning of that statute: for if it is, the justices had power to make the rate in question, and not otherwise. Now the 20th *Geo.* 2, c. 42, expressly enacts, superfluously as it has been deemed (*a*)), that where England only is mentioned in any Act of Parliament, the same notwithstanding has and shall be deemed to comprehend the dominion of Wales and the town of Berwick-upon-Tweed. In *Rex* v. *Cowle* (*b*), where Lord *Mansfield* seems to have collected and arranged all the learning and history respecting the constitution of this borough, it is also expressly recognised as part of England. But it will be said that the words of the Act, "counties at large within which such liberties or franchises lie," confine its operation to places situate within English counties, and it will be contended that Berwick-upon-Tweed, even if it is now part of England as a kingdom, is still not locally within and part of any county of England. This objection, however, cannot prevail. [*Bayley*, J. I consider Berwick-upon-Tweed to be part of the county of Northumberland. I am persuaded that I have tried persons in Northumberland for offences committed in Berwick, and that they have afterwards appeared here and received the judgment of this Court.] *Every* part of the kingdom of England is situate within and part of *some* county. The construction of the statute which will be contended for on the other side is too narrow. It was held in *James* v. *Green* (*c*), that a high constable might be appointed, and a county rate levied, *de novo*, for a town created into a county of itself by charter many years before,

the respective limits of their commissions, to have, use and exercise all and singular the powers, authorities and methods given or prescribed by this act; and all such separate jurisdictions are hereby declared to be subject thereto in the same manner, to all intents and purposes, as counties at large; any law, usage, or custom to the contrary notwithstanding."

(*a*) See 1 Bla. Comm. 99, 18th edit.

(*b*) 2 Burr. 834. And see 2 Lord Kenyon, 519, *S. C.*

(*c*) 6 T. R. 228.

although no such officer had been appointed, or such rate levied before. The same point was ruled in *Weatherhead* v. *Drewry* (*a*), with reference to a town corporate, not a county of itself; and the latter case turned upon an act of parliament, the words of which were not so large as those of the act in question (*b*).

Tindal, S. G. and *E. H. Alderson*, contrà. Much of what has been contended for on the other side may be conceded without danger to the argument in support of this rule. Berwick is now, undoubtedly, part of the realm of England, and is included within any legislative enactment affecting England. But "the town of Berwick-upon-Tweed" is almost always inserted in the statutes, and though the 20 *Geo.* 2, c. 42, provided for the omission of those words, still that statute did not constitute Berwick a part of any county in England; and, therefore, that must not be construed to apply to cases where the legislature intended to legislate for English counties in particular, and not for England generally. Now the 55 *Geo.* 3, c. 51, is one of those cases; it is manifestly intended to apply exclusively to places situate within and parts of the counties of England. The argument then is, that Berwick is not within any county, and therefore not within the operation of the statute. Originally, it is admitted, it was part of the realm of Scotland; and the mere annexation of it to England, as part of that realm, did not of itself make it part of any one of the English counties, any more than it would any other foreign and however distant country, conquered by the British arms, and annexed to the British dominions. [*Bayley*, J. Must we not presume that it was made part of

(*a*) 11 East, 168.

(*b*) 13 *Geo.* 2, c. 18, s. 7, which enacts, that where any liberties or franchises have commissions within themselves, and are not subject to the county justices, and do not, nor did before the 12 *Geo.* 2, c. 29, contribute to the county rates; the justices within such liberties may exercise the same powers within the limits of their commissions, as justices in their counties.

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the county of Northumberland, which it adjoins? In *Johnson* v. *Dealtry* (*a*), where a district, situate within the local limits of the county of York, had always been deemed part of the county of Durham, but had always contributed to the public burdens of the county of York: it was held that it was to be presumed that such district, either in the original division of land into counties, or at some subsequent period, when it was separated from the county of York, was made part of the county of Durham, on condition of its contributing to the burdens of the county of York. I have already remarked, that persons are tried in Northumberland for offences committed in Berwick.] Those must have been cases in which the indictment had been removed from the Berwick sessions by certiorari, and where it was a part of the recognizance required by the Court, that the trial should be held in Northumberland In *Rex* v. *Cowle* (*b*), Lord *Mansfield* himself prepared the form of a suggestion to be entered on the roll applicable to such a case.

Lord TENTERDEN, C. J.—It seems to me impossible to doubt that it was the *intention* of the legislature in framing this act of parliament, to include every place that had a jurisdiction of its own, and that had not previously contributed to any county rate, or been subject to any county jurisdiction. If that is evidently the intention of the legislature, then if the words they have used are too narrow to give due effect to it, we may in our construction of the act extend them, so as to produce the desired result. This borough has a separate commission, and has clearly never been subject to the commission of any county, nor contributed to the public burdens of any county. As such, it corresponds with the description of places intended to be provided for by the act; and, then, I think it quite immaterial whether it is situate within any county or not. It is very reasonable that the fund proposed to be raised

(*a*) 3 B. & A. 72. (*b*) 2 Burr. 834; 2 Ken. 519.

should be raised; and no person could be compelled to contribute to the expenses of prosecutions, and other similar expenses, except by a county rate, or a rate in the nature of a county rate, made in pursuance of the act. I am, therefore, of opinion, that the justices had authority to make this rate, and that the rule for a certiorari to quash it ought to be discharged.

BAYLEY, J.—I am of the same opinion. Any other construction of the act would, as it seems to me, be narrow and inefficient; for I cannot understand it as confined to such separate jurisdictions only as are repectively surrounded by, or situate within, any one county. It is admitted that Berwick is in England, and for the purposes of this act, if necessary, I think it must be presumed to be also in that county of England which it adjoins. *Weatherhead* v. *Drewry* (*a*) would have been decisive of this case, under the 13 *Geo.* 2, c. 18; and the present statute, though very similar, is, if any thing, more comprehensive in its terms than that.

HOLROYD, J. concurred.

LITTLEDALE, J. was gone to chambers.

Rule discharged (*b*).

(*a*) 11 East, 168.

(*b*) *Semble*, that where the cause of action arises in Berwick only, the venue *must* be laid in Northumberland. *Mayor of Berwick* v. *Ewart*, 2 W. Bla. 1036. But, in covenant against the assignee of the lessee of premises described in the declaration as situate within the liberties of Berwick, the venue *cannot* be laid in Northumberland. *Mayor of Berwick* v. *Shanks*, 3 Bingh. 459. And it is said that a fine cannot be levied, nor an ejectment brought in the Courts at Westminster, for lands there. *Jackson* v. *Mayor of Berwick*, 1 Sid. 381, 2, *tamen quære*. As to the locality of the borough of Berwick-upon-Tweed in point of law, see also the statute 11 *Geo.* 1, c. 4; Cro. Jac. 543; 2 Roll. Abr. 292; 4 Vin. Abr. 234; Cay, Abr., Shepp. Abr., Danv. Abr. *in verbo*. As to the construction of 55 *Geo.* 3, c. 51, ss. 1 & 24, see *Rex* v. *Clarke*, 5 B. & A. 665; 1 D. & R. 316.

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Where powers are vested in a select body appointed to be aiding and assisting the mayor, a notice by the mayor to the members of that body to attend a corporate meeting, need not specify the purpose for which the meeting is convened; and an election at such meeting is valid.

QUO Warranto information for usurping the office of a capital burgess of the city of Wells. Plea, stating in substance, that by the governing charter there were one mayor and twenty-three burgesses, who were called the common council, and of which twenty-three, seven were called masters; that the common council were to be aiding and assisting the mayor from time to time in all causes and matters touching and concerning the city; and that when a vacancy occurred in the sixteen common councillors, not being masters, it was to be filled up by the other common councillors, then surviving, or the major part of them (*a*); that a vacancy occurred, and that defendant was duly elected by the mayor and the major part of the capital burgesses duly assembled for that purpose, *after due notice in that behalf.* Replication, denying that due notice of the election was given. Issue thereon. At the trial before *Best*, C.J. at the Somersetshire Summer Assizes, 1827, (*b*) it appeared that the meeting at which the defendant was elected was convened by a written notice sent to all the capital burgesses in the following form (the blanks being properly filled up):—

"City of Wells.

SIR,—You are requested to attend a meeting of the Corporation on the day of 18 , at o'clock in the noon.

By order of the Mayor.

A. B. Town Clerk."

The learned Judge being of opinion that this notice was insufficient, for not specifying the purpose for which the meeting was convened, and that the election, therefore, was void, directed a verdict for the crown. In Michaelmas term, a rule *nisi* for a new trial was obtained, against which

(*a*) *Post*, 389.

(*b*) Counsel for the relator, *Wilde*, Serjt., *C. F. Williams*, and *R. Bayly*; for the defendant, *R. C. Scarlett* and *Carter*.

W. E. Taunton, Campbell, C. F. Williams, and *R. Bayly,* shewed cause. The notice in this case was defective, in not stating the purpose for which the meeting was convened. There are many authorities to shew that a corporate meeting cannot be regularly held for the purpose of an election, unless notice of the nature of the business intended to be transacted there is previously given to all the electors. The latest authority upon this subject is the case of *Rex* v. *Hill* (*a*). The election in that case was in the body at large, and not in a select body, in which respect it must be admitted that it differs from the present; but that does not vary the principle: and it was laid down there, as an established principle, that whenever a corporate meeting is held for the purpose of an election, on a day not fixed by the charter, notice of the meeting, and of the purpose for which it is convened, must be given to all persons resident within the borough, and entitled to have a voice in the election. The rule is not new. The decisions in the cases of *Rex* v. *The Mayor of Shrewsbury* (*b*), *Rex* v. *The Mayor of Carlisle* (*c*), *Rex* v. *The Mayor of Liverpool* (*d*), and *Rex* v. *The Mayor of Doncaster* (*e*), are all consistent with it; and it is recognised even in the case of *Rex* v. *Theodorick* (*f*), where it was held, that if all the persons entitled to vote were present, and consenting, they might proceed to an election, though no previous notice had been given. At all events, the notice ought to state, that some corporate business is to be transacted at the meeting, even if the precise nature of that business need not be specified; here the notice is totally silent upon the subject: it is a mere notice "to attend a meeting of the corporation."

R. C. Scarlett and *Carter,* contrà. The rule of law has

(*a*) 6 D. & R. 593; 4 B. & C. 426, (Monmouth.)
(*b*) Cas. temp. Hardw. 147.
(*c*) 1 Stra. 385.
(*d*) 2 Burr. 723.
(*e*) 2 Burr. 738, Bull. N. P. 205.
(*f*) 8 East, 543, (Thetford.)

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been laid down too broadly on the other side. In *Rex* v. *Chetwynd* (*a*), a very recent case, Lord *Tenterden*, C.J. is reported to have said, "we are all of opinion that it is not a general proposition of law, that there may not be a good elective assembly of a select body of a corporation, although no notice of the purpose of the meeting may have been previously given. It appears to me impossible to say, that there may not be, under some circumstances, a valid elective assembly by a select part of a corporation, without previous notice being given of the object." In *Rex* v. *Hill* (*b*), the question with respect to the notice was not raised upon the pleadings, and the real point there decided was, that a custom to give notice of corporate meetings by the ringing of a bell, was, under the particular circumstances of that case, an unreasonable, and, therefore, invalid custom. The cases cited on the other side do not go the length of the argument in support of which they are cited. In *Rex* v. *The Mayor of Shrewsbury* (*c*), Lord *Hardwicke* quotes it as the opinion of Lord *Parker* and the whole Court, "that when the acts are to be done by a select number, notice must be given of the time of meeting, and that it is to do some corporate act, *though what particular act need not be specified.*" That opinion seems to decide the present case in favour of the defendant. It is the duty of the select body, being to assist the mayor, to meet for that purpose whenever they receive a general notice to do so. They have duties to discharge, which the aggregate body have not, and that circumstance forms a sound and important distinction between the one and the other. It was impossible for any member of the select body to read the notice in this case, without understanding that he was summoned to attend a corporate meeting, for the purpose of assisting the mayor in the performance of some corporate business; and, if so, it was a sufficient notice. The point

(*a*) 1 M. & R. 534; 7 B. & C. 695, (Stafford.)

(*b*) 5 D. & R. 593; 4 B. & C. 426, (Monmouth.)

(*c*) Cas. temp. Hardw. 147.

decided in *Rex* v. *The Mayor of Carlisle* (*a*), was simply this, that where certain members of a corporation form a select body, and are to act as a select body, they must be summoned to attend in that capacity. In *Rex* v. *The Mayor of Liverpool* (*b*), though a question was raised as to the notice specifying the business to be performed, the case was not decided upon that point. In *Rex* v. *Wake* (*c*), it was only held, that when notice was given of a corporate meeting for one purpose, the parties assembled could not enter upon other business, unless all the members were present, and acted by general consent.

The case was argued on a former day in this term, when the Court took time for consideration; judgment was now delivered by

Lord TENTERDEN, C. J.—The question upon which the validity of the election of the defendant in this case turned upon the trial was, whether due notice had been given of holding the meeting at which he was elected. It appears that some days before the meeting, a written notice, signed by the town clerk, and importing that it was issued by the mayor, was delivered to every elector, requiring his attendance at a corporate meeting, on a certain day, at a particular hour, but not specifying the purpose for which it was intended to hold the meeting. The Lord Chief Justice of the Common Pleas, before whom the cause was tried, was of opinion that the purpose of the meeting should have been specified in the notice, and upon that ground directed a verdict to be entered for the crown; and it has been since contended here, that as the meeting was held for an election, that purpose ought to have been stated. It is very difficult to say, that the object of the corporate meeting must be stated, where it is held for an election, and that it need not be stated where it is held for another purpose. Several

(*a*) 1 Stra. 385.
(*b*) 2 Burr. 723.
(*c*) 1 Barnard. 80.

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cases were cited in the course of the argument as in point; but upon a review of all the cases, there does not appear to be a single decision proceeding on the ground, that it was necessary that the notice should mention the purpose for which the assembly was to meet. There are certainly some dicta to that effect; but there are also some to the contrary. In *Rex* v. *Hill* (*a*), the election was by the body at large, which is a very different thing; and even in that case, although each of my learned brothers expressed an opinion that the purpose for which the meeting was convened ought to have been mentioned in the notice, the judgment stands good on other grounds, independent of that opinion. The point expressly decided in that case was, that the notice given, as stated in the pleas, was not a reasonable notice, of which there could be no doubt: for it was consistent with every allegation upon that record, that the bell, which was to form the notice, might be rung for a few minutes only, and that a few individuals who lived near might assemble, and immediately upon its ceasing proceed in the election, before others who lived at a distance could possibly reach the place of meeting. The case before us is one of an election by a select body, and we are of opinion, that it was not requisite in the notice to them to specify the purpose for which the meeting was to be held. But although we are of that opinion in the present case, it by no means follows, and we avoid expressing any opinion, that where the election is by the body at large, notice of the purpose may not be necessary. The difference between the two cases is this:—The select body are appointed by the charter to be aiding and assisting the mayor in all matters concerning the city, when required so to do. It is, therefore, their duty to give their attendance whenever they receive reasonable notice from the mayor that their attendance is required; and we think it is not competent for them to say, that they abstained from attending because they had no notice of the specific purpose for

(*a*) 6 D. & R. 593; 4 B. & C. 426.

which the meeting was intended to be held. If it had appeared that there was any usage or custom in this borough for a more specific notice to be given, that would have materially altered the case; but there is not any suggestion of that kind. For these reasons we are of opinion, that the notice in this case was sufficient, and, therefore, that there ought to be a new trial.

Rule absolute.

The KING v. ROBERT BROOKS.

Where a corporator *de facto* had exercised his office more than six years, the Court, in their discretion, without entering upon the question of title, refused to grant a *quo warranto* information against him.

A RULE had been granted, at the relation of one *Payne*, a burgess of the borough of Wells, calling upon the defendant to shew cause why an information in the nature of a *quo warranto* should not be filed against him, for usurping the office of a master of that borough. Two points were made on moving for the rule: first, that the defendant was not duly elected, there not having been the proper number of electors present; and secondly, that he had not been properly sworn in. The affidavits stated, that the governing charter of the borough provided that there should be one mayor, and twenty-three capital burgesses, who should be a common council, and that seven of those twenty-three should be masters; that vacancies in the office of masters should be filled up out of the capital burgesses, by election, by the residue of the capital burgesses, or the major part of them, and that the master so elected should take the oath of office before the mayor, recorder, and six capital burgesses; that on the 6th July, 1821, the defendant was elected a master by the mayor, three masters, and seven capital burgesses only; and that the recorder was not present then, or at any time when the oath of office was taken by the defendant. The affidavit in answer merely stated that the defendant was sworn in on the 13th August, 1821, and had ever since exercised the office of a master of the borough.

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Upon the case coming on for argument, it was referred to the master of the crown-office to inquire whether the defendant had been sworn in or not, and how he had been sworn; and the master now reported "that the defendant was sworn in on the 13th August, 1821, not before the recorder of the borough, but at a convocation or meeting that was held at the town-hall, of the mayor, masters, and capital burgesses of the borough, at which the recorder was not present."

W. E. Taunton and *Campbell* appeared to shew cause against the rule, but were stopped by the Court, who desired to hear

Sir *J. Scarlett* and *R. C. Scarlett*, contrà. The defendant insists that he is protected from this information by the statute 32 *Geo.* 3, c. 58, s. 1, which provides, "that any defendant to any information in the nature of a *quo warranto* may plead that he had first actually taken upon himself, held, or exercised the office, which is the subject of such information, six years or more before the exhibiting of such information, such six years to be reckoned and computed from the day on which such defendant so pleading was actually admitted and sworn into such office." But the statute does not apply to a case like the present. Its object is to cure an irregular *election*, and to that it has hitherto been confined; there is no case in which it has been extended to cure an irregular *admission* and *swearing in*. This defendant has never been sworn in within the meaning of the statute, because that ceremony did not take place before the officers specified in the charter; the statute, therefore, cannot protect him, because the six years are to be computed from the date of the *swearing in*. Besides, the 55 *Geo.* 3, c. 184, sched. part 1, imposes a stamp duty upon the "*admission* of any person into any corporation," &c., and the affidavits do not shew that the defendant was ever *admitted*.

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Lord TENTERDEN, C. J.—As the defendant has actually held the office in question for upwards of six years, I am of opinion that we shall best exercise the discretionary power which we possess in such cases, by giving effect to the spirit of the statute 32 *Geo.* 3, c. 58, and declining to interfere on the present occasion. We are not called upon to express any opinion upon the construction of that part of the statute which speaks of the *swearing in*, because we are not *bound* to interfere and grant an information at the instance of an individual. The intention of the legislature undoubtedly was, that six years' enjoyment of a corporate office should protect the party in the possession of it, and the defendant having so far brought himself within the operation of the act of parliament, I think the best course for us to adopt is to decline interfering.

The other Judges concurred.

Rule discharged.

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A charter directed that a borough should consist of a mayor, four jurats, and two bailiffs; and that when any jurat or bailiff should die, &c. the remaining jurats and bailiffs, or the greater part of them, of whom the mayor should be one, should elect another or others of the burgesses or inhabitants to be a jurat, &c. One vacancy occurred in the office of jurat, and an inhabitant was elected a jurat, by a meeting at which the mayor, *two jurats*, and two bailiffs were present:—Held, a good election; the rule requiring the presence of a majority of each definite part of the elective body not applying, where in case of one vacancy, viz. in the office of bailiff, it would be *impossible* for a majority of the bailiffs to be present.

THIS was a *quo warranto* information, filed against the defendant, for usurping the office of jurat of the borough of Queenborough, in the county of Kent.—Plea, admitting Queenborough to be an ancient borough, and stating that the borough, from the 10th May, 42 *Ed.* 3, until the granting of the charter after mentioned, was a free borough, and that the burgesses of the said borough, during all that time, were a body corporate, consisting of mayor, bailiffs, and burgesses; that by charter 2 *Car.* 1, the governing

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charter of the borough, it was granted that the mayor, bailiffs, and burgesses, by whatever name they had previously been incorporated, should thereafter be a body corporate by the name of "mayor, jurats, bailiffs, and burgesses;" that there should be one of the more honest and discreet burgesses *or* inhabitants called mayor, to be elected as after mentioned, and four honest and discreet burgesses *or* inhabitants called jurats, and two honest and discreet burgesses *or* inhabitants called bailiffs; that the jurats and bailiffs should hold their offices for life, unless removed for reasonable cause; and that whenever any of the jurats or bailiffs should die or be removed, or withdraw from their offices, it should be lawful for the mayor and the surviving and remaining jurats and bailiffs, or the greater part of them, within convenient time, to nominate, elect, and appoint others of the burgesses *or* inhabitants to be jurats or bailiffs of the borough. The plea then averred, that on, &c., there was a vacancy in the office of jurat, and that the then mayor and the greater part of the jurats and bailiffs, having duly assembled within the borough for the purpose of nominating, electing, and appointing a jurat to fill up the said vacancy, did then and there nominate, elect, and appoint the defendant, being then and there an inhabitant of the said borough, to be a jurat of the said borough, to supply the said vacancy; and that he took the oaths and then took upon himself the office. Replication, taking issue upon the due election of the defendant. At the trial before *Park*, J., at the Kent summer assizes, 1827,(*a*) it was proved that the meeting at which the defendant was elected consisted of the mayor, two jurats, and two bailiffs, all of whom voted for him; whereupon the learned Judge directed a verdict to be entered for the defendant, giving the relator liberty to move to enter a verdict for the crown. A rule *nisi* having been, in the following Michaelmas term, obtained accordingly,

(*a*) Counsel for the relator, *Merewether*, Serjt., *Adolphus*, and *Platt*; for the defendants, *Marryat*, *Gurney*, and *Bolland*.

Gurney, *Bolland*, and *Tomlinson*, shewed cause. It must be conceded, as a general rule, that where a charter directs an election to be made by an assembly consisting of several definite bodies for the time being, *or the greater part of them*, a majority of the entire number of each of those definite bodies must be present, in order to constitute a good elective assembly (*a*). The question, however, still remains, whether that general rule applies to the particular charter now under consideration. This charter directs that there shall be a mayor, four jurats, and two bailiffs, and that vacancies in the offices of jurats and bailiffs shall be filled up by the mayor and the remaining jurats and bailiffs, or the greater part of them. Now it would, in many cases, be absolutely impossible to apply the rule in question to a borough governed by such a charter. For instance, if one of the bailiffs were to die or resign, that vacancy could never be supplied, for the other surviving or remaining bailiff could never be considered as the major part of the two. So, if it were desired to amove one of the bailiffs for misconduct, no valid assembly for that purpose could possibly be held, unless he himself attended and concurred in the measure. In the same manner, if two of the jurats should die or resign, no new jurats could be elected, for the greater part of the entire number of jurats would not be in existence, and could not, therefore, be brought together (*b*). It follows, therefore, that the general rule of construction applied to other charters, being wholly inapplicable to this, must be departed from

(*a*) See *Rex* v. *Bellringer*, (Bodmin,) 4 T.R. 810; *Rex* v. *Miller*, (Northampton,) 6 T.R. 268; *Rex* v. *Bower*, (Weymouth,) 2 D. & R. 761, 1 B. & C. 492; *Rex* v. *Wyllyams*, (Truro,) 3 D. & R. 75, 1 B. & C. 609; *Rex* v. *Headley*, (Devizes,) *ante*, vol. i. 345, 7 B. & C. 496.

(*b*) A decision upon this last ground would seem to let in the strict grammatical construction in all cases, since it would be difficult to found a rule of legal construction upon the greater probability of the occurrence of two, than of six, eight, or ten successive vacancies, before the first could be filled up.

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in this instance; and that an election by the greater part of the aggregate elective assembly composed of mayor, jurats, and bailiffs, must be held valid, without the presence of the greater part of each component part. The result will then be that the defendant was duly elected, because he was elected at an assembly where the mayor, two jurats, and two bailiffs, forming the greater part of the aggregate elective body were present and voted.

Merewether, Serjt., *Adolphus*, and *Platt*, contrà. This case must be decided according to the general and undisputed rule of law alluded to on the other side. This Court has always designated that rule as being of the highest importance to the welfare of corporate bodies generally, and will not, therefore, depart from it without very cogent reasons for so doing. The instances pointed out in argument, in which that rule could not by possibility be applied to this borough, must undoubtedly be considered as exceptions out of it, because *lex neminem cogit ad vana aut impossibilia*. But the exception ought not to be extended beyond cases of absolute necessity, particularly where the aggregate elective body can never exceed six in number, because in such a case the charter ought clearly to be so construed as to compel the attendance of as large a proportion of that number as possible. In the present case there was no necessity for the exception, because there were three jurats in office at the time when the election took place, so that a majority of the whole number of jurats might have attended. The general rule therefore applies, and the defendant's election is bad for want of the attendance of a majority of the jurats. If it should be held that a majority of the aggregate body of mayor, jurats, and bailiffs, is sufficient, an election may be had without the presence of either of the bailiffs, which would be quite inconsistent with the object and spirit of the charter. The inconvenience which might sometimes arise from a strict adherence to the general rule, was forcibly pointed out in

Rex v. *Bower* (*a*), but the Court would not yield to the argument.

The case was argued on a former day in this term, when the Court took time for consideration: judgment was now delivered by

Lord TENTERDEN, C. J.—This case came before the Court upon a motion to enter a verdict against the defendant, upon an information in the nature of a *quo warranto*, calling on him to shew by what authority he exercised the office of a jurat of the borough of Queenborough. By the constitution of that borough there are in it one mayor, four jurats, and two bailiffs, seven persons in all; and those integral parts compose the assembly by which jurats are to be elected. The defendant was elected at a meeting at which the mayor, two jurats, and two bailiffs, were present, so that he was elected by a majority of the whole number of seven. It was objected that there ought to have been three jurats present, so as to make a majority of that body, without which, it was contended, there could not be a good elective assembly. The objection was founded on several decided cases, none of which, however, will be in any degree impeached by the judgment we pronounce upon the present occasion. The language of this charter is substantially the same with that of several others upon which the decisions alluded to proceeded. It is, "that whensoever it shall happen that either, or any, of the jurats or bailiffs of the borough for the time being shall die, or be removed, or withdraw from his or their office or offices, then and so often it shall be lawful for the mayor, and other the surviving and remaining jurats and bailiffs of the borough for the time being, or the greater part of them, of whom the mayor shall be one, within a convenient time, to nominate, elect, and appoint another, or others, of the burgesses or inhabitants of the borough, for the time being, to be a jurat or jurats, bailiff or bailiffs." I have observed

(*a*) 2 D. & R. 761; 1 B. & C. 492, (Weymouth.)

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that this in substance very strongly resembles the language of other charters, in which it has been held that the words "the greater part of them" shall be referred to the former member of the sentence, enumerating the component parts of the corporation; as for instance, mayor, aldermen, and capital burgesses; and not to the latter part of the sentence where "the remaining and surviving" members of those definite bodies are spoken of. And this has been carried still further, for it has been held that it is not sufficient to have a majority of the aggregate number of mayor, aldermen, and capital burgesses present, but that a good corporate assembly cannot be held unless there be present a majority of each component definite part of it: and upon these decisions it was contended that the election of the defendant was invalid, because a majority of the entire number of four jurats was not present. In the cases, however, to which I have alluded, the judgment of the Court was founded on a rule of construction not strictly required by grammatical rules, for the words "or the major part of them," might, in each of those cases, have been referred to the latter branch of the sentence as well as to the former. Perhaps, indeed, it would have been, grammatically, more correct to refer them to the last antecedent than to one which was more remote. But the rule was laid down upon a wise and sound principle, namely, that the select body in a corporation should be compelled to fill up vacancies in its component parts as they occur, and the most convenient and certain mode of doing that is, to require at elections the presence of a majority of each of those component parts. It is by no means our intention to break in upon or weaken the authority of those decisions; but when we are called upon to construe a charter to which that rule cannot be applied, without leading to an absurdity, or an impossibility, as it would in this case, we must, in order to give effect to the charter, put some other construction on it. In this borough, if a bailiff were to die, or be amoved, or withdraw, upon the

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construction contended for, the vacancy could never be filled up. If two vacancies should occur at the same time in the office of jurat, the same consequence would follow. But it was urged, that as a majority of the jurats were in this instance in existence, they ought to have been present. To require that in one case, and to dispense with it in another, would be to give two different constructions to the very same words, which we certainly ought not to do. We think, upon the whole, that we ought to put such a construction upon this part of the charter as will give effect to the charter itself, and at the same time be uniform and consistent; and that such a construction will be given by holding that the election of the defendant by the mayor, two jurats, and two bailiffs, constituting a majority of the entire number of mayor, jurats, and bailiffs, was valid. For these reasons we are of opinion that the defendant in this case was well elected, that the verdict found for him at the trial was therefore right, and that the rule for entering a verdict for the crown ought to be discharged.

Rule discharged.

Ex parte CARRUTHERS, in the matter of the BRUNSWICK THEATRE.

MILLER had obtained a rule, calling upon "*Maurice Thomas*, esq. *deputy steward and coroner* of the Tower of London, and the liberties and precincts thereof," to shew cause why an inquisition taken before him on view of the several bodies of *David Sampson Maurice*, and others, then lying dead, should not be quashed for the insufficiency thereof. The rule was drawn up on reading the affidavits

A coroner's inquisition may be quashed in part for uncertainty, and stand good for the residue.

Where an inquisition was signed "*A.*, deputy steward and coroner," the Court refused to quash it *in toto*, as necessarily void for want of authority.

Semble, that there may be a valid custom for a coroner to appoint a deputy, or that such signature may be read as "*A.*, coroner and deputy steward."

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of *James Arding* and *George Lay*. The former stated, that *Carruthers* (the applicant), and *Maurice* (one of the deceased), were joint lessees of ground on which they built the Brunswick Theatre; that on the 28th of February last the theatre fell down, and became a ruin, by which accident *Maurice* and the other deceased were killed; that, owing to the loss sustained by the accident, *Carruthers* became insolvent, and was made a bankrupt; that his assignees had been duly invested with all his interest in the lease of the ground and the materials of the theatre; that the materials had been claimed on the part of the crown as a deodand by virtue of the inquisition; the part of which relating to the materials was as follows:—

"And the jurors, &c., further say, that the said iron roof and gutters of the said messuage in Wells-street aforesaid, and the slates of the said roof, and the lead and other materials thereon, and the timber and other materials of the said carpenters' and painters' shops, and of the said flys, and the girders on which the said shops and flys, or some part thereof, immediately preceding the said falling in and sinking, rested, and the said proscenium post, and the bricks, timber, and materials of such part of the said front external wall of the said messuage, above the line hereinbefore mentioned and described, and part of the said balcony, and of the said cautitiores, (but what precise part of the said balcony and of the said cautitiores, the jury are ignorant,) were moving to or towards, or did move to or towards, the said several deaths of the said (*Maurice*, &c.,) all, some, or one of them, at the time of the happening thereof as aforesaid. And the jurors, &c., further say that they are ignorant of the value of the said bricks, stone, timber, materials, iron roof or cast iron roof, gutters, lead, matters and things, so moving as aforesaid, and that the same is or are now lying and being in Wells-street aforesaid, or within the standing walls of the said messuage called the Brunswick Theatre, or in the yard, outbuildings, &c., within the said precinct, intermixedly and

confusedly, with other bricks, stones, timber and materials, which did not move, or were not moving to the deaths aforesaid, or any of them."

That since the accident, deponent, for himself and other creditors of *Carruthers*, presented a memorial to the Lord High Constable of the Tower of London, praying for relief; that on the 11th May last, deponent presented to the said *Maurice Thomas* a memorial addressed "to the Coroner of the Tower of London," also praying for relief; and that deponent had been informed and believed that the said *Maurice Thomas* did not deliver the said memorial as addressed, though urged by deponent so to do; and that deponent was advised and believed that such inquisition so holden before the said *Maurice Thomas* was informal, illegal, and altogether void, and ought therefore to be quashed. The latter affidavit stated, that deponent had been informed and believed the following was a true copy or extract from a charter of *Jac.* 2, relating to the boundaries and liberties of the Tower of London:—

"And our will, &c. is, and we do hereby, &c. grant, that the steward of the court of our said liberty of our said Tower of London for the time being shall be a coroner of us, &c. within our said liberty, and shall have full power and authority to do and execute all such matters and things within the said precincts and liberty, which to the office of a coroner doth of right appertain, having first taken the usual oath," &c.

That the above is all that relates to the appointment of a coroner for the said liberty of the Tower, in the said charter contained; and that deponent had been informed and believed that one ——— *Ricketts*, Esq. is the present steward and coroner for the said liberty.

The rule was obtained on two grounds; first, that the inquisition having been held before a *deputy* coroner, was *coram non judice*, and therefore void *in toto:* and secondly, that it was uncertain as to what parts of the building were found deodand, and therefore void at least *pro tanto*.

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Tindal, S. G., shewed cause, contending, that the Court could not quash the inquisition upon either of the objections. With respect to the first, although generally speaking the office of coroner could not be filled by deputy, there might nevertheless be a custom in particular districts for the coroner to appoint a deputy; and as the existence of such a custom in this particular case was not negatived by the affidavits produced by the party objecting to the inquisition, the Court would presume that every thing had been done rightly, and would not quash the inquisition on that ground. [*Bayley*, J. It does not appear conclusively upon the face of the inquisition that it was held before a deputy coroner. It is signed "*Maurice Thomas*, deputy steward and coroner." That may mean that he is deputy steward, and not deputy coroner, but coroner; for the word deputy does not necessarily override all that follows it, and apply to the office of coroner, as well as to that of steward.] With respect to the second objection, it must be admitted that the inquisition is somewhat vague and uncertain in that part of it which relates to the deodand, but not so much so as to call upon the Court to quash it; and at all events they will not quash the whole inquisition on that ground; for even if it is bad in part, it may be good for the residue.

Lord TENTERDEN, C. J.—I think there are not sufficient grounds laid before us to induce us to quash the inquisition *in toto*, as having been held before an incompetent officer; but that part of it which relates to the deodand is in my opinion bad for uncertainty, and ought to be quashed. It seems to me, therefore, that the rule for quashing that part of the inquisition should be made absolute, and as to the residue, discharged.

The other Judges concurred.

Rule accordingly.

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The KING *v.* The JUSTICES OF WILTSHIRE.

The practice of entering and respiting an appeal against a poor rate at the next session after its allowance, as a matter of course, without any notice, is not warranted by the 17 *Geo.* 2, c. 38, s. 4.

But where that practice prevails, and an appellant has acted upon it, and the Justices at the second sessions refuse to hear the appeal, this Court will issue a *mandamus* to them to do so.

THIS was a rule calling upon the defendants to shew cause why a writ of *mandamus* should not issue, directed to them, commanding them to enter continuances, and to hear an appeal against a poor rate. It appeared upon the affidavits that the rate was made and allowed at a period which left the appellant time to give notice of appeal for the last Michaelmas sessions, which he did accordingly; but at those sessions he merely entered and respited his appeal as a matter of course. That was confessedly the practice of the sessions in this as well as many other counties. Between the Michaelmas and Epiphany sessions he gave notice of trial for the latter; and at those sessions he appeared, and proposed to try the appeal. It was then objected on the part of the respondents, under the statute 17 *Geo.* 2, c. 38, s. 4, that the Michaelmas sessions having been "the next sessions" after the allowance of the rate, the appellant ought to have given notice of trial for, and come prepared to try at those sessions; and that not having done so, he was now out of time, and his appeal could not be heard. The sessions being of opinion that the objection was well founded, dismissed the appeal.

Bingham shewed cause against the rule. The sessions were right. The appellant was out of time. The 43 *Eliz.* c. 2, gave a general power of appeal against poor rates, without any limitation in point of time; but the 17 *Geo.* 2, c. 38, expressly limits the time to the *next* sessions, and requires a *previous* notice. In that statute the giving notice at the next sessions is evidently a condition precedent to the right of appealing at all. Section 34 provides that it shall be lawful for persons aggrieved by the rate, "*giving reasonable notice* to the churchwardens, &c., to appeal to the *next* general or quarter sessions;" and the justices *there* are to receive *such* appeal, "and to hear and

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finally determine the same." All that is to be done at the next sessions. Then follows a provision for the adjournment of the appeal if necessary; "but if it shall appear to the said justices that reasonable notice was not given, then they shall adjourn the said appeal to the next quarter sessions, and *then* and *there* finally hear and determine the same:" so that the adjournment, if necessary in the opinion of the justices, must be made at the *next* sessions after the allowance of the rate. There are many cases shewing that this is the sound and proper rule of construction as applied to this act of parliament. In *Rex* v. *Atkins* (*a*) it was held, that an appeal against a poor rate must be lodged at the next sessions after the allowance of it. In *Rex* v. *Coode* (*b*), that it must be made in *all* cases to the next sessions;—for the 17 *Geo.* 2, c. 38, s. 4, has repealed the 43 *Eliz.* c. 2, s. 6, which left the appeal to any sessions. In *Rex* v. *Micklefield* (*c*), the same rule was laid down, *because* it is by making the rate that the party is aggrieved. In *Rex* v. *The Justices of Worcestershire* (*d*), where it was held that an appeal against the allowance of overseers' accounts, under the 17 *Geo.* 2, c. 38, s. 4, must be made to the next sessions after the allowance (*e*), it was also held, that the section was in that respect a repeal of the 43 *Eliz.* c. 2, s. 6. It has undoubtedly been held in *Rex* v. *the Justices of Sussex* (*f*), *Rex* v. *the Justices of Dorsetshire* (*g*), with respect to a poor rate, and in *Rex* v. *Thackwell* (*h*), with respect to overseers' accounts, that the *next* sessions means the next practicable sessions; but still that is the next practicable after the allowance and after the notice, which in this case was the Michaelmas sessions. It will be urged that the practice of the sessions is conformable with the course which the appellant has pursued; but that is imma-

(*a*) 4 T. R. 12.
(*b*) 1 Bott, 281; Cald. 464.
(*c*) 1 Bott, 284; Cald. 507.
(*d*) 5 M. & S. 457.
(*e*) See *Rex* v. *Justices of Berkshire* 1 Bott, 208, *S. P.*
(*f*) 15 East, 206.
(*g*) 16 East, 200.
(*h*) 6 D. & R. 61; 4 B. & C. 62; 3 D. & R. M. C. 337.

terial: if the practice is not warranted by law, it will not be supported by this Court. The practice of entering and respiting, as a matter of course, is clearly bad; if any postponement had been desired, the Court of Quarter Sessions should have been applied to at the Michaelmas sessions, to adjourn the appeal to the Epiphany sessions, and even that could only have been done upon satisfying the Court by evidence, that reasonable notice had not, and could not, have been given. There are undoubtedly decisions in cases of appeal against orders of removal, which are opposed to this argument, and which will probably be relied upon by the other side. They do not, however, apply to this case, for they turn upon the construction of an act of parliament very differently worded from that now under consideration, and they are besides extremely unsettled and contradictory in themselves. *Rex* v. *The Justices of Bucks* (*a*), and *Rex* v. *The Justices of Staffordshire* (*b*), do go to shew, that the sessions ought to have received this appeal, and to have adjourned it if the notice was insufficient; but even those cases shew the necessity of some notice. In *Rex* v. *the Justices of Wilts* (*c*), this Court corrected a rule of practice of the sessions, though lawful in itself; but here the rule of practice is absolutely unlawful, and must be repudiated by the Court.

Scarlett and *Wyborn*, contrà, were stopped by the Court.

Lord TENTERDEN, C. J.—It appears to me, upon the sound construction of this act of parliament, that where there is time between the allowance of the rate and the next sessions for a reasonable notice of appeal to be given, and no notice is given, the Justices not only may, but ought to reject the appeal, and not suffer it to be entered at all. But where they do suffer it to be entered, I think

(*a*) 3 East, 342.
(*b*) 7 East, 549.
(*c*) 10 East, 404; and see *Rex* v. *Justices of North Riding of Yorkshire*, 3 T. R. 150.

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they have most clearly the power of adjourning or respiting it; for such a power is incident to their character as a court of justice. The statute requires them to hear and finally determine the appeal; but not at any particular session: it expressly gives them the power of adjourning the hearing on account of a defective notice, and it impliedly gives them a discretionary power of adjourning it for other causes which may appear to them sufficient for that purpose. In the present case, however, the justices have exercised no discretion at all; for they first, according to their own practice, and as a matter of course, suffered the appeal to be entered and respited without any inquiry respecting the notice: and then afterwards, upon that very practice being objected to, they repudiated it, and refused to hear the appeal. I am of opinion, that the practice is neither a wise one, nor one in conformity with the act of parliament; but it was notorious as the practice of these sessions, and it cannot be allowed that a party coming into that Court as a suitor, and following the practice of the Court, is to be injured by those means, and deprived of the opportunity of having his appeal heard upon the merits. Under such circumstances I think he was entitled to have his appeal heard at the adjourned sessions, and, therefore, that the rule for a *mandamus* to the justices to hear it ought to be made absolute. As to the practice, I certainly recommend it to be altered; it is not consistent with the act of parliament, and it is calculated to produce both delay and expense.

The other judges concurred.

Rule absolute.

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The KING *v.* RICHARDS.

Where the prosecutor of an indictment for a misdemeanour found at sessions, removes it into K.B. by *certiorari*, he is not entitled to costs under 7 *Geo.* 4, c. 64, s. 23.

THIS defendant had been indicted at the quarter sessions for one of the misdemeanours enumerated in the statute 7 *Geo.* 4, c. 64, s. 23 (*a*), and the prosecutor having removed the indictment by writ of *certiorari* into this Court, the defendant was tried at the assizes and convicted.

Campbell now moved for the costs of the prosecution.

Lord TENTERDEN, C. J.—This subject has been taken into consideration by the twelve judges, and they are

(*a*) Which recites, that "for want of power in the Court to order payment of the expenses of any prosecution for a misdemeanour, many individuals are deterred by the expense from prosecuting persons guilty of misdemeanours, who thereby escape the punishment due to their offences;" and "for remedy thereof" enacts, "that where any prosecutor or other person shall appear before *any* court on recognizance or subpœna, to prosecute or give evidence against any person indicted of any assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdemeanour for receiving any stolen property, knowing the same to be stolen, of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace officer, of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, of wilful and corrupt perjury, or of subornation of perjury; *every such* court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as *courts* are hereinbefore authorized and empowered to order the same in cases of felony (s. 22); and although no bill of indictment be preferred, it shall still be lawful for *the* court when any person shall have *bonâ fide* attended *the* court, in obedience to any such recognizance, to order payment for his or her trouble and loss of time, in the same manner as in cases of felony; provided, that in case of misdemeanour the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate."

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unanimously of opinion, that a prosecutor who removes an indictment for a misdemeanour by writ of *certiorari* from the Court of Quarter Sessions into this Court, is not within the meaning of the statute.

Rule refused.

THE KING on the prosecution of the EAST INDIA COMPANY *v.* DESPARD and five others.

A *special* juror can be challenged for alienage *only* at the time when the special jury is struck; if at all.

Where several defendants are brought up for sentence, some after judgment by default, and others after verdict, the counsel for all must first be heard in mitigation, and then the counsel for the crown in aggravation of punishment.

THESE defendants were indicted, together with one *Prescott*, for a conspiracy. *Despard* and *Prescott* pleaded not guilty; of the other defendants some pleaded guilty, and others suffered judgment to go by default. At the trial before Lord *Tenterden*, C. J., at the London Sittings after last Hilary Term, *Despard* was convicted, and *Prescott* acquitted.

Brougham, who at the trial had appeared for *Prescott* only, within the first four days of last term, moved on the part of *Despard* for a rule *nisi* for a new trial, upon an affidavit stating, that the indictment was tried before a special jury of the city of London, nominated at the instance of the prosecutors; that one of the special jurors forming such jury was an alien, being a Spanish refugee, and not naturalized, who had only been resident in England about four years, and who was no householder, but a lodger only; that deponent, (the defendant *Despard*,) had no knowledge, intimation, or conception, that such juror was disqualified from serving on the jury until after the trial; that the name of such juror had been struck out of the special jury list on the reduction thereof at the Crown Office, previous to the trial, at the instance of the defendants, and that an affidavit of that fact, with a copy of the list of the names of the twenty-four special jurors as reduced annexed thereto, with the name of the said juror struck thereout, sworn by the clerk of deponent's attorney, was filed; that deponent

was wholly ignorant and unacquainted how or by what means the name of such juror got so introduced as a special juryman in the list of the jury nominated to try this traverse, and that an affidavit of that fact also, deposed to by himself and his solicitor, was filed; that if deponent had known, or entertained any knowledge, or intimation, or conception of such juror having been an alien, and disqualified from serving on a British jury, deponent would instantly have objected to him as a juryman to try the issue of this indictment; that deponent immediately caused to be procured an affidavit of such juror, detailing in substance the statement above made as regards the disqualification of such juror from sitting on a British jury, which affidavit was also filed; to the contents of which affidavits deponent referred, submitting that he ought not as a British subject to be called up for judgment under such trial. The short ground of the motion, therefore, was, that one of the jurors having been an alien, and disqualified from serving, there had been a mis-trial.

Lord TENTERDEN, C. J. suggested to *Brougham*, that there might be this difficulty in the case, that if the Court should consider the objection to be well founded, and that there had been a mis-trial, that would apply to the whole indictment, and they might find it necessary to set aside the verdict which had been given *in favour* of the defendant *Prescott*, as well as that which had been given *against* the defendant *Despard*. His lordship therefore recommended this application being withdrawn, and another in arrest of judgment being made when the defendants should be brought up for judgment, if the point was still considered tenable. The case accordingly stood over to this term, when the defendants being brought up for judgment,

Denman, C. S., for the defendant *Despard*, moved, upon the same affidavits, for a rule to shew cause why the judgment should not be arrested. It is clear upon consi-

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deration of the provisions of the new Jury Act, 6 *Geo.* 4, c. 50, with reference to the facts stated in the affidavits, that the verdict in this case has been returned by a jury, one of whom was incompetent to return it, and therefore that no judgment can be pronounced upon it. The first section describes and enumerates the persons qualified to serve as jurymen, "except as hereinafter excepted." The third section, among other excepted cases, provides, "that no man, not being a natural born subject of the king, is or shall be qualified to serve on juries or inquests, except only in the cases hereinafter expressly provided for." That exception is provided for in s. 47, which does not apply to the present case, the object being merely to allow aliens the privilege of being tried by juries composed in part of aliens. [*Bayley*, J. Does the act of parliament state what shall be the consequence in case an unqualified person shall serve?] It certainly does not; but it is submitted that the consequence is obvious and necessary, namely, that the verdict is void. If one alien may serve upon a jury without vitiating the verdict, there seems no reason why a verdict returned by a jury wholly composed of aliens should not be good. It was decided in the recent case of *Rex* v. *Tremaine* (*a*), that the fact of an unqualified person having served on the jury vitiated the verdict, and the Court granted a new trial there, saying, that they could not pronounce any judgment upon such a verdict. [*Bayley*, J. Are you not too late in this case? Should you not have challenged the juror at the time of the trial?] The affidavits shew that it was not possible for the defendant to adopt that course, because he did not know at that time of the objection.

Tindal, S. G. contrà. The act of parliament itself furnishes a complete answer to this objection. The third section certainly disqualifies an alien from serving as a juror in a case like the present, but s. 27, clearly shews that

(*a*) 7 D. & R. 684. 5 B. & C. 254. 3 D. & R. M. C. 528.

the latest period at which the objection can be taken advantage of is by challenge to the poll at the time of the trial; for that states, "that if any man shall be returned as a juror for the trial of any issue in any of the courts hereinbefore mentioned, who shall not be qualified according to this act, the want of such qualification shall be good cause of challenge, if the Court shall be satisfied of the fact." [Lord *Tenterden*, C. J. And that principle is adopted from the common law, as laid down by Lord *Coke* (*a*), and from the former statute of 4 & 5 *W.* & *M.* c. 24, s. 15.] It seems, however, that in the present case, even this is too late; for the twenty-seventh section of the new act provides, that nothing therein contained shall extend in any wise to any special juror. The proper period for objecting to special jurors seems to be, when the parties meet to strike the jury, which is an opportunity equivalent to that of challenge to the poll at the time of the trial; and if that opportunity be neglected, the parties appear to be concluded. This seems to follow from sections 31 and 32, which regulate the qualifications and selections of special juries; in the latter of which an express provision is made for objecting to the jurors at the time the special jury is struck.

Lord TENTERDEN, C. J.—There is no doubt that, generally speaking, the disqualification now relied on is a good cause of challenge to the poll. It has always been so at common law; and it was expressly continued so by the statute of *William* and *Mary*. But, where it is good cause of challenge, as in the case of a common jury, it is clear that if the juror objected to is not challenged before he is sworn, supposing the party at that time knew of the objection, the opportunity of making the objection is gone. The case of *Rex* v. *Tremaine* was very different from the present. There the juryman objected to had not been summoned, and his name did not appear on the panel; so

(*a*) Co. Litt. 156, b.

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that the defendant, who did not discover those facts till after the trial, had no previous means or opportunity of challenge. In a case like the present we ought to be extremely cautious how we entertain the objection, because this objection, if successful, must operate to the disadvantage of one of the defendants who has been acquitted. Upon the main point of this case, it seems to me, that looking at s. 27, of the present jury act, the opportunity of objecting to this special juryman is not only now gone by, but was so at the time of the trial. If he had been a petit juryman, I think the only mode of enforcing the objection would have been by challenge to the poll before he was sworn; but being a special juryman, I think the only opportunity was at the time when the jury was struck; for the provisions of the act with respect to challenges are expressly declared not to apply to any special juror. The obvious reason for that is, that the parties have, what they have not in the case of a petit jury, a previous opportunity of objecting or challenging when the jury is struck. For these reasons I am of opinion that we ought not to grant the rule prayed for.

The other Judges concurred.

Rule refused.

Tindal, S. G., having then moved for the judgment of the Court upon the defendants,

Brougham, *Denman*, *Platt*, and *Ryland*, for the several defendants, contended that as some of the defendants had pleaded guilty, and others had suffered judgment to go by default, the counsel for the defendants could not, as in ordinary cases, be called upon to address the Court first in mitigation of punishment, but that the counsel for the prosecution ought first to be heard in aggravation. This point was discussed, and the rule of court regulating the

practice on such occasions (*a*) explained and modified in the case of *Rex* v. *Bunts* (*b*), which was an authority in support of the present argument, and where the following points were decided:—"When a defendant is brought up for judgment, after verdict, the defendant's affidavits shall be first read, and then those for the prosecution; after which, the defendant's counsel shall be heard, and lastly the counsel for the prosecution. But when a defendant is brought up for sentence, after judgment by default, the prosecutor's affidavits shall be first read, then the defendant's; after which the counsel for the prosecution shall be heard, and lastly the counsel for the defendant. If no affidavits shall be produced, the counsel for the defendant shall be first heard, and then the counsel for the prosecution." Then if all the defendants in this case had pleaded guilty, or suffered judgment by default, their counsel would clearly have been entitled to be last heard. Such an arrangement was necessary in order to put the Court in possession of the facts of the case; and it would be hard for the majority of the defendants to be ousted of a privilege, merely because some had elected to plead, and take their trials.

Tindal, S. G. contrà, was stopped by the Court.

Lord TENTERDEN, C. J.—The general rules of practice, in cases such as this, as in all other cases, are made for the purpose of general justice and convenience. The rule that has been referred to does not embrace, in terms, a case like the present. The question then is, which is the best course to adopt with a view to general convenience. The struggle between the parties is for the last word. However important that may be considered when it is to be addressed to a different tribunal, it can be of no importance when it is to be addressed to us. Then let us

(*a*) Reg. Gen. M. T. 29 *G.* 3. (*b*) 2 T. R. 683.

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look at the situation of this case. No affidavits are put in on the part of the prosecution; on the part of the defendants exculpatory affidavits are put in. Some of the defendants have pleaded not guilty, and taken their trial; others have pleaded guilty; others have suffered judgment by default. If we were to mould the rule of practice so as fully to meet this particular case, we should of necessity have to listen to at least two sets of addresses from the counsel on both sides. With respect to the defendants who have pleaded guilty and suffered judgment by default, the prosecutor's counsel would have to begin, and the defendant's to follow; with respect to the other defendant, the case would be reversed. Such a course of proceeding would be productive of great inconvenience to the Court, without any proportionate advantage to the defendants; and it seems to me, therefore, that the general convenience will be best consulted, and no inconvenience, at any rate certainly no injustice, be worked to the defendants, by deciding that the counsel for the defendants shall be first heard, and afterwards the counsel for the prosecution.

The other Judges concurred, and counsel were heard accordingly.

The KING v. The INHABITANTS of the County of BUCKS, in re GREAT MARLOW BRIDGE.

Pending an indictment, at the instance of a parish, against a county, for not repairing a bridge, the object being to try whether the parish or the county were liable to repair the bridge, the Court refused to grant the defendants an inspection of the parish books relating to former repairs of the bridge.

AN information had been filed against the defendants, the inhabitants of the county of Bucks, at the instance of the bridge-wardens and trustees of Great Marlow Bridge, for a nuisance in not repairing that bridge. Pending that information a rule had been obtained, on the part of those defendants, calling upon the bridge-wardens and trustees of the bridge to shew cause, "why the attorney or agent

for the defendants should not have the sight and inspection of all the bridge books, papers, and minutes of proceedings of them the said bridge-wardens and trustees, and all other documents relating to the said bridge and the repairs thereof, and to take copies of them, or any part of them, at the costs and charges of the said defendants." The affidavit of Mr. *Tindal*, the Clerk of the Peace for the county of Bucks, upon reading which the rule was drawn up, stated, " that the information was obtained at the instance of the bridge-wardens and trustees, who were trustees of lands in the parish of Great Marlow, the annual rents whereof were applicable to the repairing the bridge; that in order to make a good defence to the information it was necessary, on the part of the defendants, to inspect the documents mentioned in the rule, touching and concerning the receipt of the rents and the management of the estates held by the bridge-wardens, and the account of the disbursements of such rents; that he had applied to the solicitor to the bridge-wardens for permission to inspect such documents, who informed him that the bridge-wardens had fully considered the subject, and declined to shew them; that he had found in his office, among the records of the county, a written statement, entitled, " Case of Great Marlow Bridge, 1786," containing copious extracts from a book of accounts of the bridge-wardens, called the " Bridge-book," from which it appeared that the bridge-wardens have been from time to time elected by, and their accounts submitted to, and allowed by, the inhabitants of the town and parish of Great Marlow in vestry assembled; that it did not appear from such statement that such book would disclose the title of the bridge-wardens to any estates held by them in respect of their office, but, on the contrary, it was set forth in such statement that it was not known how, or by whom such estates were left, or to what uses, other than by the " Bridge Book;" that it appeared by such statement that the accounts of the bridge-wardens between 1627, when they commenced, and 1786, contained

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many entries of disbursements by bridge-wardens, consisting of fines and other matters in respect of indictments for the non-repair of the said bridge; and that it would require more time and attention to inspect and examine such book on the part of the defendants than could be given for that purpose at the time of the trial of the information." In opposition to the rule the affidavit of two of the existing bridge-wardens was filed, describing them as "two of the bridge-wardens or trustees of the estates held for the benefit of repairing Marlow bridge, as far as the net rents and profits of the said estates will extend," and stating, "that the bridge-wardens are a body of private trustees, making use of the income of the estates belonging to them as such trustees, without being liable to be controlled or called to account for their expenditure by the quarter sessions or any public body whatever."

Gurney and *R. Bayly* shewed cause. The books and papers specified in the rule are the private documents of the bridge-wardens, and are kept by them for their own use and for the use of the parishioners of Great Marlow only. The inhabitants of the county are mere strangers, having no interest in the documents, and, therefore, no right to inspect them. *The Mayor of Southampton* v. *Graves* (*a*), *Cox* v. *Copping* (*b*). Besides, as it is a general rule that a defendant shall not be compelled to produce evidence against himself, inspection of a defendant's documents is never granted at the instance of a prosecutor in a criminal case; *Regina* v. *Mead* (*c*): and the object of the present application is to compel the parishioners of Great Marlow to produce documents, which, though they are intended to be given in evidence in favour of the defendants in this case, may be used against the parishioners of Great Marlow in any prosecution which may hereafter be

(*a*) 8 T. R. 590.
(*b*) Lord Ray. 337.
(*c*) Lord Ray. 927.

instituted against them for not repairing the bridge. The question intended to be tried is, whether the inhabitants of the county of Buckingham or the parish of Great Marlow are liable to repair the bridge; and the case, at present, ought to be regarded as if two prosecutions had been instituted, one against the county, and the other against the parish. In that view of the case the rule above alluded to will apply, for in *Rex* v. *Holland* (*a*), which was an information against the defendant founded upon the report of a board of inquiry in India, this Court held that the defendant was not entitled to an inspection of the report (*b*).

Maltby, contrà. The present applicants cannot be considered as strangers; at least they are not more so than was the applicant in *Harrison* v. *Williams* (*c*). That was an action against the defendant for the breach of a bye-law restraining non-freemen of a corporate city from exercising trades within its limits, and this Court compelled the corporation to allow the defendant an inspection of their books, although he was not a member of the corporate body, but merely a resident within the city. The public are entitled to use the bridge, and are interested in its being kept in repair; and the inhabitants of the county have a direct interest, because they are, *primâ facie*, liable to repair the bridge. The bridge-wardens, therefore, are trustees both for the county and the public; and persons who are trustees for others only, or for others jointly with themselves, are compellable to allow inspection of their books. *Pickering* v. *Noyes* (*d*). These cannot properly be deemed books of a private nature, for they are clearly subject to the inspection of all the parishioners in vestry. In *Allam* v. *Tapp* (*e*), the question concerned a private right, and that

(*a*) 4 T. R. 691.

(*b*) And see *Crew* v. *Blackburne*, 1 Wils. 249; 2 Str. 1006; *Benson* v. *Port*, 1 Wils. 240; *Rex* v. *Lee*, 1 Wils. 240; *Rex* v. *Smallpiece*, 2 Chit. R. 288; *May* v. *Gwynne*, 4 B. & A. 301; *Allam* v. *Tapp*, 2 W. Bl. 850; and *Rex* v. *Clear*, 7 D. & R. 393; 4 B. & C. 899.

(*c*) 4 D. & R. 820; 3 B. & C. 162.

(*d*) 2 D. & R. 386; 1 B. & C. 262.

(*e*) 2 W. Bl. 850.

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was the ground upon which an inspection of books was there refused; but here the question concerns a public right. In *Browning* v. *Aylwin* (*a*), which was an action against a sworn broker of the city of London for negligence in making a contract, the Court compelled the defendant to produce his books, upon the ground that he was in the nature of a public agent (*b*). It must be admitted that the Court would not in a criminal prosecution compel the party accused to produce documents which must furnish evidence against himself. But the parishioners of Great Marlow are not the parties indicted, and the application here is made, not on behalf of the prosecutor, but on behalf of the inhabitants of the county, who are the party accused. Neither can the present strictly be considered as a criminal prosecution, because although the proceeding is criminal in its form, its object is to determine a question of civil liability, and it concerns a civil right for the infringement of which the law has provided no other remedy.

Lord TENTERDEN, C. J.—The question upon the trial of the information in this case will be, whether the inhabitants of the county of Buckingham or the inhabitants of the parish of Great Marlow are liable to repair the bridge. The defendants will contend that the inhabitants of the parish are liable, and the question, therefore, will really in effect be the same as if the inhabitants of the parish had been indicted. Now it is clear, as well from the authorities as upon principle, that if this application had been made on behalf of the prosecutor of an indictment against the parish, we could not have compelled the parish to produce their books, and thereby to furnish evidence against themselves; and as the effect of granting the application in the present case might be to compel the parish to furnish

(*a*) 7 B. & C. 204.

(*b*) And see *Fox* v. *Jones*, 1 M. & R. 570; 7 B. & C. 732, where the Court compelled the Marshal of the King's Bench prison, in an action against himself for an escape, to grant an inspection of the Habeas Corpus and Committitur.

evidence which might at some future time be used against them in support of an indictment found against them, I think we ought not, (considering this as a contest between the county and the parish,) to compel the parish to produce the documents mentioned in the rule. Then if we ought not to compel the parishioners to produce these documents, ought we to compel the bridge-wardens, who are trustees for the parish, to produce them? I think not. It has been urged that the bridge-wardens are trustees for the county or the public, rather than for the parish; but the affidavits throughout lead to the inference that they are trustees for the parish; for they shew that they are elected by, and that their accounts are submitted to the parishioners in vestry, and, in short, that they are identified with the parish. Upon the whole, therefore, as we could not compel the parishioners to produce evidence against themselves, so, I think, we ought not to compel the bridge-wardens, who are their trustees, to do so; and, consequently, that this rule must be discharged.

BAYLEY, J.—I am of the same opinion. To entitle a party to an inspection of books, either the books must be of a public nature, or the party desiring to inspect them must have an interest in them. In this case it seems to me that the books are not of a public nature, and that the parties desiring to inspect them have no interest in them. In the case of parochial or corporation books, no person wholly unconnected with the parish or corporation has a right to inspect them. This is a public prosecution, and the application is made on behalf of the defendants. If the public have, as has been contended, an interest in these books, the application ought to be granted; but these books are not kept for the benefit of the public, or even of the inhabitants of the county, but for the benefit of the inhabitants of the parish only. They are, properly speaking, not public but parochial books, and this is, in effect, an application made by one of two litigant parties

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against the other, to compel him to produce his own private documents, in order to establish a case against himself. Such an application cannot be granted. In the late case of *Rex* v. *Lord Cadogan* (*a*), this Court decided that they could not grant a mandamus to the lord and steward of a manor to inspect court rolls, for the purpose of supporting an indictment against the lord for not repairing a road within the manor. Here, indeed, the proceeding is against the parties who apply for the inspection, but the effect would be the same, for if they obtained an inspection of the parish books, they might afterwards indict the parish for not repairing the bridge, and use their own books against them as evidence in support of that indictment.

HOLROYD, J. was absent.

LITTLEDALE, J. concurred.

Rule discharged (*b*).

(*a*) 1 D. & R. 559; 5 B. & A. 902. (*b*) *Vide ante*, 127.

PEIRSE *v.* SHARR and CLAUGHTON.

B. holding land of *A.* for a term of years, underlets part to *C.* *from year to year*. At the expiration of the term *B.* agrees with *A.* to hold on *from month to month*:—In the absence of any new agreement between *B.* and *C.*, the tenancy from year to year continues.

REPLEVIN. Defendant *Sharr* avowed, and defendant *Claughton*, as his bailiff, made cognizance, for 5*l.* for a quarter's rent of a messuage in Bermondsey. Plea in bar *non tenuit*, and issue thereon. At the trial before *Park*, J., at the Surrey summer assizes, 1827, (*c*) the following facts appeared. The defendant was lessee, amongst others, of the messuage in question, for a term which expired in January, 1826; previously to which he underlet the messuage to the plaintiff, *habendum* from year to year, at the rent of 20*l.* a year, payable quarterly. On the determination of the avowant's term he agreed to hold on as tenant from month to month, and the plaintiff continued to occupy the premises and to pay his quarterly rent till Michaelmas,

(*c*) Counsel for the plaintiff, *Gurney*; for the defendant, *Chitty*.

1826, when the distress in question was taken. Upon this evidence on the part of the avowant, it was contended for the plaintiff, that the former being himself only tenant from month to month, could not create a tenancy from year to year, and that therefore the evidence adduced by the avowant himself had negatived the tenure set up by the avowry, and shewed that the plaintiff, without entering upon his own case, was entitled to a verdict. The learned Judge being of that opinion, directed a verdict to be entered for the plaintiff, damages 4*l.* 4*s.* (*a*). In the following Michaelmas term *Chitty* obtained a rule *nisi* for a new trial, on the ground of misdirection; against which

Gurney now shewed cause. The plaintiff cannot be presumed to have continued as tenant from year to year after the defendant had ceased to have an interest, which would entitle him to make such a demise. [*Bayley*, J. Why should it not be a tenancy from year to year, to be given up when the monthly tenancy should be determined?] The plaintiff was only a monthly tenant to the defendant.

Chitty, contrà, was stopped by the Court.

Lord TENTERDEN, C. J.—There must be a new trial. We cannot presume a new agreement between the plaintiff and the defendant, from the circumstance that the defendant had entered into a new agreement with his landlord upon the expiration of the original term. No evidence was given of the plaintiff having agreed to become a monthly tenant. If that were presumed, we must presume that the plaintiff agreed to pay his rent monthly or weekly. The

(*a*) As the goods are restored upon the distrainee's executing the replevin bond, he is seldom put to any inconvenience beyond the expense of the replevin bond; and the usual course is for the plaintiff in replevin, when he succeeds, to take a verdict for 4*l.* 4*s.* to cover that expense. But it is competent to the plaintiff to prove and recover for further damages. *Ognell's* case, 3 Leon. 213.

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plaintiff could not be hurt by a continuance of the old tenancy. On the other hand, if a new tenancy was created, the rent would become payable at an earlier period than before.

BAYLEY, J.—It was a question for the jury whether a new tenancy had been created or not. *Sharr* possessed the power of creating a yearly tenancy, though he acquired only a tenancy from month to month. A new title accrued to *Sharr*, and the plaintiff continued to hold under him. If new terms were then agreed upon between the parties, then the avowry might be wrong; but this was purely for the jury, and the learned Judge should have told them so. The avowant, though only tenant from month to month, would have a reversion in him upon a demise for a year.

Rule absolute (*a*).

(*a*) In *Mackay* v. *Mackreth*, 2 Chitt. 461, it was held, that where tenant from year to year granted an under-lease for 21 years, the executor of the lessor might sue upon a breach of covenant committed after the death of the lessor. It is true, that in that case the demise was by indenture, but the judgment of the Court did not proceed upon the ground of estoppel; nor, indeed, as an interest would pass, would any estoppel arise.—And see *ante*, vol. i. 430, (*a*).

COCKS *v.* PEACHEY.

Where the jury, in returning a verdict, say that they find for the plaintiff as to part of the declaration, he will not be allowed the expenses of witnesses called to support a different part, although the verdict be entered for him generally.

CASE. The declaration contained three counts: the first, charging the defendant with erecting and continuing a foundery and workshops adjoining the plaintiff's dwelling-house, and causing great noise and smoke to enter the dwelling-house; the second, for keeping and continuing a certain foundery and workshops, and causing, &c.; and the third, generally for causing noise and smoke to enter the plaintiff's premises. Plea, not guilty. At the trial before Lord *Tenterden*, C. J., at the sittings at Guildhall after last Michaelmas term (*b*), the plaintiff went into evidence

(*b*) Counsel for the plaintiff, *Gurney* and *Comyn*; for the defendant, *Scarlett*, A. G.

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of annoyance arising from the defendant's original foundery and workshops, and also into evidence of injury resulting from some new works which the defendant had recently added. A verdict was found for the plaintiff, damages 40*s.* costs 40*s.*, the jury saying that they found for the plaintiff as to the new works erected by the defendant. On the taxation of costs, the defendant's attorney objected to the allowance of the expenses of witnesses who had been called to prove the damage done to the plaintiff's premises by the original foundery and workshops, contending that the jury had not given any compensation for such damage. The Master having disallowed these expenses,

Comyn now moved for a rule calling upon the Master to review his taxation. The verdict having been entered generally, the plaintiff is entitled to the whole of the costs incurred in proving the facts stated in his declaration. The only cases in which part of the plaintiff's costs have been disallowed, have been where a verdict has been found for the defendant upon some particular counts.

HOLROYD, J.—The Master does not give costs against you, which might perhaps be reasonable.

LITTLEDALE, J.—It is the same thing, as if there had been a verdict for the defendant upon this part of the case.

Lord TENTERDEN, C.J., and BAYLEY, J., were not in Court.

Rule refused.

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GREENLAND *v.* DYER.

A bill accepted for differences on time bargains in stock, is valid in the hands of an indorsee without notice.

INDORSEE against acceptor of a bill of exchange. At the trial the defendant called the drawer as a witness, who proved that the bill had been drawn for the amount of differences upon stock-jobbing transactions paid by the witness as broker for the defendant. Upon this evidence it was contended, on the part of the defendant, that the bill was void under 7 *Geo.* 2, c. 8; but the defendant not having succeeded in shewing that the plaintiff had notice of the consideration of the bill, the case did not go to the jury.

Chitty now moved for a new trial, on the ground that the bill was absolutely void by the provisions of the statute; and he cited *Barjeau* v. *Walmsley* (*a*), *Steers* v. *Lashley* (*b*), *Brown* v. *Turner* (*c*), and *Bulmer, ex parte* (*d*), where, as in the present case, the bill was drawn and accepted for differences upon time bargains.

Lord TENTERDEN, C. J.—In the hands of the drawer the bill would have been void. The distinction between securities void by statute and contracts void by statute is well known. The contract upon which this action is brought is not the contract for doing the illegal act. The contract mentioned in the statute is that by which the parties agree to pay and receive differences. The contract on the bill of exchange is a contract to repay the broker. The broker himself, who has made the illegal contract, cannot recover; but when the bill passes into the hands of an innocent person, no case has said, nor is there any principle to shew, that such a party cannot recover.

BAYLEY, J. concurred.

LITTLEDALE, J.—It might as well be said that a bill was void for fraud between the original parties.

Rule refused.

(*a*) 2 Stra. 1249. Money lent at play held recoverable.

(*b*) 6 T. R. 61; 1 Esp. N. P. C. 166. There the indorsee had notice of the consideration.

(*c*) 7 T. R. 630; 2 Esp. N. P. C. 631. In that case the indorsement was after the bill had become due.

(*d*) 13 Ves. 313. The question was between the original parties.

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MURRAY *v.* REEVES, Gent., one, &c.

An agreement by which *A.*, an opposing creditor of *B.*, an insolvent, undertakes to withdraw his opposition, on the terms that *A.* shall be sole assignee, and shall in that capacity receive a certain sum within a given time, is void.

ASSUMPSIT. The declaration stated, that one *Shearer* being indebted to plaintiff, and being in prison for debt, and having petitioned the Insolvent Debtors' Court to be discharged, and that plaintiff having opposed, and being about to oppose, *Shearer*'s discharge *for the general benefit of his creditors;* whereof defendant had notice; thereupon, in consideration of the premises, and that plaintiff would withdraw his opposition to the discharge of *Shearer*, defendant undertook to consent that plaintiff should be sole assignee of *Shearer*'s estate and effects—to furnish attested copies of certain marriage settlements—to furnish an account of tenants' names and rentals, and of arrears of rent of certain estates to which *Shearer* was entitled for life—to guarantee that plaintiff, as assignee of the estate and effects of *Shearer*, should receive 90*l.* or 100*l.* out of *Shearer*'s estate, within three weeks from his appointment as assignee, plaintiff taking the necessary steps which defendant would point out to him—to guarantee 40*l.* in lieu of the furniture and effects which the assignee of *Shearer* was entitled to as vesting in the insolvent in right of his wife, and which was then in Paris—and to furnish an inventory and valuation of the property in one *Cull*'s hands, and also an account of *Cull*'s debt, upon oath. That plaintiff, confiding, &c., withdrew his opposition to the discharge of *Shearer*, and had not since opposed his discharge. That plaintiff was appointed assignee of the estate and effects of *Shearer*, whereof defendant had notice. Breach, defendant's neglect of every other branch of the promise above stated, *in totidem verbis*. The money counts were added. Plea, *non assumpsit*, and issue thereon. At the trial before Lord *Tenterden*, C. J., at the adjourned Middlesex sittings after last Michaelmas term (*a*), the facts stated, and the agreement described in the declaration, were clearly proved,

(*a*) Counsel for the plaintiff, *Campbell* and *Wyborn*; for the defendant, Sir *J. Scarlett* and *Hutchinson*.

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and the only question was, whether any action was maintainable upon such an agreement. After hearing the counsel on both sides upon that point, the Lord Chief Justice expressed himself of opinion, that upon the face of the declaration the action could not be maintained, inasmuch as the agreement there set out, and upon which the action was brought, was contrary to public policy, and therefore illegal and void. His lordship, however, would not direct a nonsuit, but allowed the plaintiff to take a verdict, with liberty to the defendant to move either to enter a nonsuit, or to arrest the judgment. In Hilary term last, Sir *J. Scarlett* having moved accordingly, and obtained a rule *nisi* to enter a nonsuit, with leave to move afterwards in arrest of judgment in case that rule should be discharged (*a*),

Campbell and *Wyborn* now shewed cause. *Nerot* v. *Wallace* (*b*), on which the defendant will rely, was decided principally on the ground that the assignees, having no control over the proceedings of the commissioners, were unable to perform that which formed the consideration of the defendant's promise. And in *Kaye* v. *Bolton* (*c*), where a person, by articles of agreement under seal, covenanted to pay and discharge all sums due from a trader against whom a commission of bankrupt had issued, the assignees, with the consent of all the creditors, undertaking to join in superseding the commission, the agreement was held, upon a demurrer to the declaration, to be good in law. The case of an insolvency is more favourable than that of a bankruptcy, inasmuch as it is at all times competent to the detaining creditor to consent to the insolvent's discharge. This is what is done here, though the plaintiff has also engrafted some conditions against which no complaint is made.

(*a*) *Post*, 432, (*b*).
(*b*) 3 T. R. 17.
(*c*) 6 T. R. 134

Sir *J. Scarlett* and *Hutchinson*, contrà. The object of the legislature was to provide for the discharge of the insolvent, and also to protect the creditors. The effect of the agreement in question is to screen the insolvent from examination, and thereby to prevent the disclosure of property and the detection of fraud.

Cur. adv. vult.

Judgment was afterwards delivered by

Lord TENTERDEN, C. J., to the following effect. This action was brought upon an agreement, by which the defendant, in consideration that the plaintiff would withdraw his opposition to one *Shearer*, who had applied for his discharge under an Insolvent Debtors' Act, undertook, among other things, to consent that the plaintiff should be sole assignee of *Shearer*'s estate and effects, to guarantee that the plaintiff, as assignee, should, within three weeks from his appointment as such, receive out of the insolvent's estate 90*l.* or 100*l.*, he taking the steps that the defendant should point out to him, and also to guarantee a sum of 40*l.* in lieu of the furniture and effects to which the plaintiff, as assignee, might become entitled as vesting in the insolvent in right of his wife; and the action was brought to recover those two sums of money. It appeared upon the trial that *Shearer* had in fact been under examination respecting his schedule, according to the practice of the Insolvent Debtors' Court in cases of opposition; and it was contended on the part of the defendant, that his engagement having been entered into in consideration of withdrawing a creditor's opposition to the discharge of an insolvent debtor, was void in law; and we are of that opinion. An arrangement of this kind necessarily takes from the commissioners that superintendence, control, and power of temporary imprisonment, which the legislature intended them to possess; and consequently deprives the other creditors of the benefit of that full, fair, and free dis-

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closure of the state of the insolvent's affairs, to which they are entitled. Such a bargain, whatever may have been intended or effected in the present case, may in many cases give protection to fraud and concealment by the debtor, to the great prejudice of the creditors, and is therefore, in our opinion, contrary to the policy of this part of the law, and void. It was urged on the part of the plaintiff, that a creditor may lawfully make such a bargain as the present, because he may, if he pleases, consent to the discharge of the debtor at any time, even after he has been committed or remanded by the commissioners for a certain time. It is true that a creditor may so consent, but if the debtor obtains his discharge by such means, his relief under the statute, with respect to the claims of other creditors, will in many cases be rendered questionable, and if the imprisonment were under the 17th section, for fraudulent concealment, would probably be lost. If the opposition made by one creditor be withdrawn, and no other creditor takes up the proceeding, the debtor may obtain the full benefit of the statute, without making that full disclosure which the statute requires; and where one creditor begins an opposition and afterwards withdraws it, other creditors may lose the opportunity of opposing, or may neglect to do so upon the belief that the debtor has performed all that the law requires of him. The law requires that the debtor shall make a full, fair, and free disclosure, for the benefit of all his creditors, and that in the first instance by his schedule; but a knowledge that the consequences of fraudulent concealment may be obviated by a subsequent arrangement, may operate as an encouragement to fraudulent concealment in the first instance; which ought to be discouraged by all practicable means. Besides, agreements like the present may in some cases, if allowed, be the means of prejudicing and oppressing an honest debtor, by inducing his friends to make a sacrifice in order to relieve him from a vexatious and groundless opposition; an opposition set up merely for the purpose of making terms for withdrawing

it. For these reasons we are of opinion that the agreement in this case is void in law, and that the rule for entering a nonsuit ought to be made absolute.

Rule absolute (*a*).

(*a*) And see *Smith* v. *Bromley*, cited Dougl. 696; *Jackson* v. *Lomas*, 4 T. R. 166; *Jackson* v. *Davison*, 4 B. & A. 691; *Rogers* v. *Kingston*, 2 Bingh. 441.

EDMONDS *v.* LOWE.

In answer to an action upon a bill drawn by the defendant, and by him indorsed to the plaintiff, the acceptor cannot be called to prove that it was indorsed upon a consideration which failed through the default of the plaintiff.

ASSUMPSIT on a bill for 198*l.* drawn by defendant on and accepted by Beuzeville, and indorsed by defendant to plaintiff. At the trial before Lord *Tenterden*, C. J., at the sittings at Guildhall after last Michaelmas term (*b*), the formal proof being gone through, it appeared upon cross-examination that the plaintiff, being the owner of a dishonoured check of Beuzeville's for 70*l.*, Beuzeville brought the bill in question to the plaintiff, and exchanged the two securities: the defendant's counsel then opened the following case. Beuzeville accepted the bill in question on account of a debt owing by him to the defendant, and offered to get it discounted. The defendant having indorsed the bill in blank, Beuzeville delivered it to the plaintiff, upon an understanding that if the plaintiff, who was a bill broker, would procure cash for it for the defendant, he might deduct the 70*l.* due from Beuzeville on the check. The plaintiff did not procure the bill to be discounted, but retained it in his own possession. Beuzeville being called to prove these facts, was rejected as incompetent, on the ground of interest, and the plaintiff obtained a verdict. In Hilary term, *Denman*, C. S., obtained a rule *nisi* for a new

(*b*) Counsel for the plaintiff, *Campbell* and *Patteson*; for the defendant, *Denman* and *Chitty*.

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trial, on the ground of the rejection of Beuzeville, and also upon affidavits verifying the above facts, and accounting for the defendant's not being prepared to release Beuzeville at the former trial; it being intimated that the defendant was to pay the costs of that trial in the event of the rule being made absolute upon the statements in the affidavits, and not on the rejection of the witness (*a*).

Campbell and *Patteson* now shewed cause. Beuzeville was interested in defeating this action, except as to the 70*l.*, in which he was not interested, because upon the action being defeated he would become liable to the plaintiff for that sum. Then there was a direct interest as to the costs. With respect to the letting in the defendant upon payment of costs, the Court will not favour a defence which is to be supported by a witness who requires to be released. The release should be ready in the first instance.

Denman and *Chitty*, contrà. Beuzeville was an agent for the defendant, and in *Barker* v. *Macrae* (*b*) it was held, that a carrier, who delivers a sum of money with which he is entrusted to the wrong person, is a good witness, *ex necessitate*, to prove the delivery. [*Bayley*, J. Can there be any doubt whether Beuzeville would be liable to the defendant? *Holroyd*, J. Agents have been witnesses *ex necessitate* ever since the time of Lord *Coke*.] It was out of the usual course for the acceptor of a bill to pass it over. The Court will not be disposed to favour an objection founded on the incompetency of a witness arising out of a minute interest; and it now appears by the affidavits that Beuzeville came in reality to speak against his interest.

Lord TENTERDEN, C. J.—Beuzeville being unable to pay his debt to the defendant, proposes to accept a bill, on

(*a*) *Post*, 438, (*b*). (*b*) 3 Campb. 144.

which he becomes answerable to the defendant that the bill shall be paid by himself, and enters into an implied engagement to indemnify the defendant against the consequences of his indorsement (*a*). He had therefore an interest in protecting the defendant from the payment of the costs of this action. The case is said to be taken out of the general rule by the circumstance of the witness's being an agent. Agents are ordinarily excepted. Persons employed in an ordinary course of agency are witnesses *ex necessitate*. These form an exception to the general rule. This person was not an agent in the ordinary sense of the word, and is not within the exception. If he had been released, the question would have been raised whether the plaintiff ever assented to the arrangement on which he is alleged to have received the bill.

The other Judges concurred.

Rule absolute upon payment of costs.

(*a*) See *Jones* v. *Brooke*, 4 Taunt. 464.

LESTER *v.* JENKINS.

In an action by bill on a bill of exchange falling due after the first day of the term, of which the declaration is entitled generally, the plaintiff's attorney may give verbal evidence that the action was not brought until after the bill of exchange became due, without producing the writ.

ASSUMPSIT by the indorsee against the acceptor of a bill which became due on the 1st February, 1828. The declaration was entitled generally of Hilary Term. At the trial, before Lord *Tenterden*, C. J., at the sittings at Guildhall after last Easter Term (*b*), it was objected on the part of the defendant, that as the declaration had relation to the 23d of January, the first day of the term, the

(*b*) Counsel for the plaintiff, *F. Pollock* and *Ryland*; for the defendant, *Brodrick*.

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plaintiff must be taken to have filed his bill before any cause of action had accrued. To obviate this objection, the plaintiff's attorney was called, who stated that he had received his instructions to sue on the 3d of February. It was contended, on the part of the defendant, that when a plaintiff elects to treat the issuing of the process, and not the filing of the bill, as the commencement of the action, he is bound to produce the writ. The learned judge held the evidence sufficient, but gave the defendant leave to move to enter a nonsuit. A verdict having been found for the plaintiff,

Brodrick now moved accordingly. In *Morris* v. *Pugh*(*a*), Lord *Mansfield* says, "The bill is not the commencement of the suit, the writ is." (*b*) There the question was, whether any evidence could be given to contradict the record. [*Bayley*, J. That was settled in the late case of *Granger* v. *George* (*c*). You only produce the writ for a collateral purpose.] The writ may have been issued by another attorney. In *Pugh* v. *Robinson* (*d*), it was held, that a promise laid on the first day of the term may be supposed

(*a*) 3 Burr. 1241; 1 W. Bla. 312, 320; Bull. N. P. 138.

(*b*) Where a defendant is sued without an original writ, the exhibiting of the bill is, strictly speaking, the first proceeding in the cause, the bill being exhibited upon the supposition, either true or false, of the defendant's being in court *on some other occasion*. The latitat or bill of Middlesex issues upon a distinct fictitious cause of action, (the trespass expressed in the queritur,) for the purpose of creating that occasion. The courts now, regarding the intention for which the latitat or bill of Middlesex is sued out, will permit the plaintiff to connect the issuing of that process with the cause of action stated in the bill, for the purpose of enabling the plaintiff to defeat a subsequent tender or the plea of the statute of limitations, &c., but will not oblige him to do so.

(*c*) 7 D. & R. 729; 5 B. & C. 149.

(*d*) 1 T.R. 116; where it appears that upon special demurrer this objection would have prevailed. *Hutchinson* v. *Thomas*, 2 Lev. 141, (which case was cited and allowed *per curiam*, Trin. 15 *Geo.* 2, B. R. Serjt. Hill's MSS.); 1 Wms. Saund. 40; 2 Wms. Saund. 1 d. And query whether it was open to the defendant to take this objection at Nisi Prius. If the objection had been entertained, and the plaintiff had refused to be nonsuited, it seems questionable whether the

to have been made previously to the sitting of the Court on that day, before which time the declaration could not be filed, though being entitled generally of the term, it might have relation to that day.

Lord TENTERDEN, C. J.—Where the writ is produced, the indorsement is nothing more than a declaration made by the attorney.

BAYLEY, J.—You cannot prove the contents of the writ without producing it, but either party may shew the actual time of the commencement of the action, without resorting to the contents of the writ.

HOLROYD, J.—The question in the case in *Burrow*, was, whether any evidence could be received to rebut the effect of the record, and the decision was, that parol evidence was admissible.

Rule refused. (*a*)

jury could have found that the defendant did not undertake *modo et formâ*. In *Dodson* v. *Bell*, Tho. Jones, 87, 3 Keb. 693, 2 Lev. 176, where the same point was raised in arrest of judgment, the Court, upon the suggestion of the plaintiff, inquired into the true time of the filing of the bill, and finding that this was after the cause of action accrued, they ordered judgment to be entered for the plaintiff, thus treating the informality rather as error in process than as error in law. In the principal case, the evidence of the attorney appears to have been clearly admissible to prove the non-filing of the bill before the 1st of February, whatever difficulty may have been felt with respect to the affirmative proof of the commencement of an action *by latitat*, without producing the writ itself.

(*a*) WOOLDRIDGE v. WOOLDRIDGE, Administratrix of WOOLDRIDGE, K. B. M. T. 1827.

ASSUMPSIT. To the bill and declaration was prefixed the following special memorandum:—"Be it remembered that on the 20th day of January, in the 7th year, &c., *Elizabeth Wooldridge*, administratrix, &c. of *George Wooldridge*, brought her bill into the office of the clerk of the declarations of the Court of King's Bench, according to *the course and practice of the same Court*, and filed the same bill as of Michaelmas term, in the said seventh year, &c.," An issue whether plaintiff was administratrix at the time of the exhibiting of the bill must be found for the plaintiff, if the record contains a special memorandum that the bill was filed on a day subsequent to the grant of administration, even where such memorandum is irregular and not warranted by the practice of the Court.

1828.

LESTER v. JENKINS.

which bill follows in these words, "Worcestershire to wit, &c."—Plea, that at the time of the exhibiting of this bill the plaintiff was not administratrix, &c., and issue thereon. At the trial, before *Vaughan*, B., at the Worcester Summer Assizes, 1827, the following facts appeared:—The defendant was arrested in Trinity vacation, 1826, on a *latitat* returnable in the following term, when he duly put in and justified bail. Letters of administration were granted to the plaintiff on the 10th of January, 1827, and on the 20th of that month the declaration was delivered, entitled as above. Upon this it was objected on the part of the defendant, that as the defendant was not an officer of the Court, or in the actual custody of the marshal, the special memorandum was not *according to the course and practice of the Court*, and that the bill must therefore be taken to have been exhibited in Michaelmas term, in, or as of, which term the plaintiff was bound to file her bill upon process returnable in that term, and that she was consequently not administratrix at the time mentioned in the plea. The learned Judge was of opinion that the plaintiff had proved the issue, but gave the defendant leave to move to enter a nonsuit.

Campbell now moved accordingly, citing *Best* v. *Wilding*, 7 T. R. 4, and *Swancott* v. *Garth*, 4 East, 75. A bill may be filed in the vacation as of the preceding term, but it can be specially entitled as of a day out of term only in actions against prisoners or officers of the Court, in order that suitors may not be deprived of their remedies by reason of the privilege of such defendants. This is therefore a declaration of Michaelmas term, and as the granting of administration does not relate back to the death of the intestate, as probate of a will does to that of the testator, the plaintiff was not administratrix at the time of the exhibiting of the bill.

Lord TENTERDEN, C. J.—The judge at Nisi Prius can only look at the record, and he must look at the whole record. By this record it appears that the bill was exhibited on the 20th of January. The plea is, that at the time of exhibiting the bill the plaintiff was not administratrix. The plaintiff was then administratrix. All that the Judge had to look to was whether the plaintiff was administratrix on the 20th of January. He could only take the day on which the bill was stated to be exhibited.

BAYLEY, J.—If the issue had been "whether administratrix at the time of the commencement of the suit," it ought to have been found against the plaintiff.

HOLROYD, J.—At Nisi Prius the Judge could only look at the memorandum. There would have been great difficulty in supporting the memorandum, if application had been made to expunge it. It may be questionable whether it is error on the record. (Vide *Dodson* v. *Bell*, ante, 431, n.)

LITTLEDALE, J.—I think the plaintiff had no right to make this special memorandum.

Rule refused.

DOE, on the joint and several Demises of JOHN ELLIOT, Sir WILLIAM PRATT CALL, Bart., and CHARLES LAMBERT, *v.* JAMES HULME. 1828.

EJECTMENT by landlords against tenant. At the trial before Lord *Tenterden*, C. J. at the sittings at Westminster, after Easter term (*a*), it appeared that the defendant had held under the lessors of the plaintiff, by a written agreement creating a tenancy from year to year, from January, 1827, determinable at three months' notice, *without reference to the time of entry*. The defendant had been served with the following notice to quit, signed by one of the lessors only:—

Where joint lessors are partners in trade, a notice to quit in the names of all, signed by one only, is valid.

"Mr. James Hulme. Sir, We do hereby give you notice to quit and deliver up to us possession of all that messuage or tenement and premises called the Camden Arms, Kensington, with the stables and appurtenances thereunto belonging, *on or before the 24th day of November next*. Dated this 22d day of August, 1827.

For self and partners, Sir William Pratt Call and Charles Lambert,

JOHN ELLIOT, Stag Brewery, Pimlico."

Elliot, who signed the notice, was the managing partner in the brewery. Upon this it was objected, that the notice should have been made to expire at the end of the year of the tenancy, which had been proved to be not in November but in January; and that one joint lessor could not in his own name, and without shewing an authority from the other joint owners, put an end to the tenancy. The learned Judge overruled both these objections, but reserved the latter point. A verdict having been found for the plaintiff,

Adolphus now moved to enter a nonsuit, agreeably to

(*a*) Counsel for the plaintiff, *Brougham* and *Talfourd*; for the defendant, *Adolphus*.

1828.

DOE d. ELLIOT v. HULME.

the liberty reserved. In *Right* d. *Fisher* v. *Cuthell* (*a*) a notice given by two out of three joint tenants, in the name

(*a*) 5 East, 451, *S.C.* differently reported as to the proviso in the lease, 2 Smith, 83, 84, n.; *S. C.* 5 Esp. 149. In that case the lessors of the plaintiff were trustees, and the lease, under which the defendant held, expressly required a notice "under his *or their* respective hands." In *Doe* d. *Whayman* v. *Chaplin*, 3 Taunt. 120, it was held, that where four joint tenants jointly demise from year to year, one of them may give notice to quit and recover *his share* in ejectment. But for this decision in the Court of Common Pleas, it might, perhaps, have been contended, that where *A.* and *B.* demise jointly to *C.* to hold as long as both parties please, it is competent to either of the three, by determining his own will, to put an end to the tenancy; and that a yearly tenancy, which is an estate *de anno in annum quamdiu ambabus partibus placuerit*, differs from a tenancy at will, which is an estate *quamdiu ambabus partibus placuerit*, merely in superadding the terms that the tenancy shall be put an end to only at the close of a year, and that the determination or discontinuance of the will shall be signified six months in advance, leaving the necessity of entirety of consent the same in the one case as in the other. It is true that a tenancy at will is not determined upon the death of one of several lessors, or of one of several lessees, 5 Co. Rep. 10, Co. Litt. 56; but that depends not upon the ground that part of the will on each side continues, and that a continuance of the entire will is unnecessary, but on the principle that the parties are possessed *per my et per tout*, and that the estate survives; and that where this is the case, the survivor may be considered as having been originally the sole lessor or the sole lessee; as a surviving feoffee may plead a feoffment to himself, without naming his companion, as if the conveyance had been originally made to himself alone. Co. Litt. 185, and the cases there cited. That which is conceived to have been the old practice appears to be more convenient than the rule laid down in *Doe* d. *Whayman* v. *Chaplin*, under which it would seem, that where I pay 100*l.* a-year for the rent of a house to *A.* and *B.*, I may, upon receiving notice from *B.* when it is too late for me to give a cross notice to *A.*, be compelled to pay 50*l.* a-year to *A.* for the privilege of occupying every room in common with *B.* and his assigns; and if the demise be joint, it appears to be immaterial whether *A.* and *B.* are joint tenants or not. The inconvenience with respect to the occupation of land with a stranger, though not so palpable as that arising from a tenancy in common of a house, would in many cases be such that a party would be paying rent for what he might very justly regard as a *damnosa hæreditas*, even though the parties claiming to be jointly interested should not employ persons to sow weeds upon the fallow land, and plough in

of the whole, was held to be insufficient. [*Bayley*, J. In the present case the lessors of the plaintiff were partners in trade.] But it is submitted that nothing can be looked at except the (*a*) estate which the parties had in the land. [*Bayley*, J. That circumstance may affect the question of authority.]

Lord TENTERDEN, C. J.—The question is, whether an authority must not be presumed here. I am of opinion that it must be presumed.

BAYLEY, J.—There must be a notice which the party who receives it can act upon. Here the tenant had that security.

HOLROYD, J. and LITTLEDALE, J. concurred.

Rule refused. (*b*)

the unripe crops, as was proved to have been done in a late case of trespass *quare clausum fregit* tried upon the Western Circuit, (*Lavis* v. *Austin* and others, Devon Summer Assizes, 1827, coram *Best*, C. J.,) in which the claimants resorted to this unusual mode of asserting their supposed right.

(*a*) The nature of the interest of the lessors appears to be immaterial, it being competent on the one hand for tenants in common to make a joint demise, and on the other for joint tenants to make several demises, though a separate demise by a joint tenant will operate as a severance of the joint tenancy.

(*b*) In this case the person who signed the notice was the sole managing partner, but it is conceived that every *acting* partner would have the same implied authority, especially in a case where the tenancy to be regulated was ancillary to the partnership trade, as appears to have been the case here.

1828.

BERNARD PINNEY *v.* JOEL PINNEY.

Vendee of an executor, where there has been no exclusive possession, cannot maintain trover without producing the probate. The original will is not admissible.

TROVER for a horse. At the trial before Lord *Tenterden*, C. J., at the sittings at Westminster after last Easter term, the following facts appeared:—Francis Pinney died in March, 1827, having made two wills, by one of which he appointed the defendant executor, and by the other his son, Francis Pinney, junior. No probate had been granted on either will. Francis Pinney, junior, sold the horse to the plaintiff, put a new lock on the door, and sent the plaintiff the key. It appeared, however, that the defendant had frequently used the horse, which he claimed as part of the testator's effects. In order to make out the title of Francis Pinney, junior, to sell, the plaintiff tendered in evidence the will by which the latter was appointed executor. This the learned Judge refused to receive in evidence, and held, that inasmuch as the plaintiff had not deduced a title from the testator through the will, by evidence of a probate granted to Francis Pinney, junior, and had shewn no exclusive possession of the horse, he was not entitled to recover. The plaintiff was accordingly nonsuited.

Gurney now moved to set aside the nonsuit. Francis Pinney, junior, being shewn to be appointed executor by his father's will, might sell before probate (*a*). Besides which the horse was in the custody of the plaintiff, and must be taken to have been used with his permission.

Lord TENTERDEN, C. J.—I thought at the trial that there was no proof of title or of the exclusive possession, and I am still of that opinion.

BAYLEY, J.—The horse was delivered to the plaintiff, who was not in a condition to shew a title until the will

(*a*) *Vide post*, 437, (*a*).

was proved; though when probate is granted, it relates back to the death of the testator (*a*).

Rule refused (*b*).

(*a*) An administrator, whether appointed under an intestacy or by reason of there being no executors named in a will, or in consequence of the executor named by the testator having renounced or refused to prove the will or died intestate, derives his authority solely and originally from the grant of the letters of administration; and as his title has no relation to the death of the party whom he represents, any cause of action vested in him in his representative capacity, which arises after the death of the party whose estate he administers cannot be said to have *accrued*, with reference to the statutes of limitation, until the time at which the letters of administration are granted. *Murray* v. *East India Company*, 5 B. & A. 204. Still it is competent to the administrator to sue upon a cause of action arising between the death of the intestate and the grant of administration, though the right of action was at the time vested in the ordinary, the grant of administration operating as an assignment of such right of action. But the position of an executor seems to be this: he takes upon the death of the testator, by virtue of the will, and of the will only, as fully and immediately as the devisee of a real estate takes the land devised; the difference in the two cases being merely in the mode of proving the will. In the first case the law admits and requires no other proof than the probate; in the latter case the probate is wholly nugatory, whilst on the other hand it is necessary to produce the original will in writing, to satisfy the Statute of Wills, (32 *H.* 8, c. 1,) and to prove the observance of certain other formalities, in compliance with the provisions of the fifth section of the Statute of Frauds, (29 *Car.* 2, c. 3.) When, therefore, it is said that an executor may do certain acts before probate, all that seems to be meant is, that the acts are of such a nature, that before there will be an opportunity of calling the executor to an account for them, he will be enabled to set himself right *ab initio*, by obtaining this only legitimate evidence of the existence of his representative character.

(*b*) S. P. *per* Ward, C. B. *Chaunter* v. *Chaunter*, Devon summer assizes, 1708, 11 Vin. Abr. 205, pl. 20. And see 1 P. Wms. 768, the judgment of Lord *Macclesfield*, C., in *Comber*'s case.

1828.

GRIMMANN v. LEGGE.

Upon a tenancy from year to year determinable at a quarter's notice, the lessor licenses the tenant to quit in the middle of a quarter, and the tenant quits and the lessor accepts possession. This is a surrender by operation of law, destroying the right to rent for the whole or any part of the current quarter.

USE and occupation. At the trial before Lord *Tenterden*, C. J. at the sittings at Westminster after last Easter Term (*a*), the following facts appeared. At Christmas, 1826, the defendant became tenant to the plaintiff of the upper part of a house, at 50*l.* a-year, payable quarterly, and to quit at a quarter's notice. At Lady-day the defendant paid a quarter's rent, and then gave notice to quit. In April a dispute arose about an oil-cloth, upon which the defendant said she would quit the house. The plaintiff answered, "Go, I shall be glad to get rid of you." The defendant removed her goods, and, on the 19th of April, delivered up the key of the apartments which she had occupied to the plaintiff, who accepted it. On the part of the plaintiff it was contended, that as the quarter had begun, he was entitled to recover 12*l.* 10*s.* for the quarter's rent to Midsummer, or at least a proportion of that sum up to the 19th of April. The learned judge left it to the jury to say, whether the effect of the conversation between the parties was not this, that the plaintiff meant that if the defendant would go, she should pay no rent at all for the occupation since Lady-day. The jury found a verdict for the defendant, which

Campbell now moved to set aside. The plaintiff objects to the manner in which this case was left to the jury. He would object also to the finding, if he were not precluded by the smallness of the sum (*b*). What passed between

(*a*) Counsel for the plaintiff, *Campbell* and *Chitty*; for the defendant, *Curwood*.

(*b*) Where a plaintiff has obtained a verdict for less than 20*l.*, and an application is made on the part of the defendant for a new trial, on the ground of a mistake in the jury, or upon any other ground, which will not entitle the defendant to the relief prayed, except upon the terms of payment of costs, and no question of right is concluded by the verdict, the Court in general refuse to interfere, because the favour not being worth the price to be paid for it, the

these parties, coupled with the acceptance of possession, would at the most amount only to a licence to quit, which would not be sufficient to determine the contract. *Mollett* v. *Brayne* (*a*). That case afterwards came before the Court, and it shews that the plaintiff is entitled to recover the whole amount for the quarter's rent, inasmuch as a subsisting term cannot be surrendered, except by a note in writing or by operation of law. [*Bayley*, J. The defendant gives up possession, and the plaintiff takes possession. Is not that a surrender by operation of law?] It is true that *Whitehead* v. *Clifford* (*b*) may be said to be an authority to shew that the plaintiff was not entitled to the whole 12*l.* 10*s.* [*Bayley*, J. The rent is entire. Could the plaintiff ever sue for less than a quarter?] The law would imply a promise to pay for use and occupation. In *Hull* v. *Vaughan* (*c*), the Court of Exchequer thought that there need not be a contract to render the party liable for use and occupation. Here the parties were in the same situation as if there had been no contract.

granting of such a rule would be merely encouraging a gratuitous spirit of litigation. The same principle applies where the plaintiff seeks to set aside a verdict for a mistake of the jury, (and, therefore, upon payment of costs,) whilst upon his own shewing a second verdict could, at the best, give him only a verdict for less than 20*l.* And in this term, upon a motion for a new trial, where the verdict was for 5*l.*, beyond 18*l.* which had been tendered, and must therefore be paid at all events, the rule was held to apply.

(*a*) 2 Campb. 103. In that case Lord *Ellenborough* held, that a yearly tenant, who quits in the middle of a quarter under a verbal licence from the landlord, is bound to pay rent to the end of the year, and the Court refused to grant a rule *nisi* for a new trial.

In *Mollett* v. *Brayne*, the demised premises consisted of apartments in a house occupied by the lessor. The tenant entered at Lady-day, and quitted on the 29th of December, 1808. The apartments remained unoccupied until after the following Lady-day; so that another year had begun without a regular notice to quit, and without a re-entry by the lessor; but the action was brought in April, 1809.—*Editor's MSS.*

(*b*) 5 Taunt. 518.

(*c*) 6 Price, 157. And see *Rumball* v. *Wright*, 1 C. & P. 590. But see *Birch* v. *Wright*, 1 T. R. 378.

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Lord TENTERDEN, C. J.—There was an express contract to pay rent at Midsummer; before that period arrived a quarrel took place, upon which the plaintiff told the defendant that she might go; and as soon as the furniture was removed the key was sent and accepted. The question is whether the jury might not presume that the contract was abandoned. I am of opinion that they might.

BAYLEY, J.—*Whitehead* v. *Clifford* shews that the whole rent cannot be recovered; and where there is an express contract you cannot raise an implied one. In *Cook* v. *Jennings* (*a*), where there was a covenant to pay so much for freight for goods delivered at *A.*, it was held, that freight could not be recovered, *pro ratâ itineris*, upon the acceptance of the goods at *B.*, where the vessel was wrecked in the course of her voyage to *A*.

HOLROYD, J., and LITTLEDALE, J., concurred.

Rule refused.

(*a*) 7 T. R. 381.

MAGRANE *v.* WHITE.

The authority of the Speaker with respect to the costs and expenses of witnesses before election committees, under 53 *Geo.* 3, c. 71, extends to witnesses summoned on behalf of the sitting member.

ASSUMPSIT for the expenses of a witness attending on behalf of the defendant, the sitting member for the county of Dublin, before an election committee. By 53 *Geo.* 3, c. 71, s. 2, full costs and expenses incurred by reason of frivolous and vexatious objections to voters are given, and such costs and expenses are directed to be ascertained and recovered in the same manner as are now provided by law, (i. e. under 28 *Geo.* 3, c. 52,) for the recovery of costs and expenses in cases of frivolous and vexatious petitions. The Speaker's certificate, describing the party as "a witness summoned, &c." is conclusive evidence that he was summoned as such witness.

The third section, after reciting that it is expedient that provision shall be made to ensure the more punctual payment of *all* costs, expenses, and fees which may become due to witnesses, officers of the House, and parties, by reason of the trial of controverted elections, directs that recognizances shall be entered into by *petitioners* for the payment of all costs, expenses, and fees. And by sect. 7, it is enacted, "that in all cases where any question shall arise as to the amount of the reasonable costs, expenses, or fees which shall be due and payable to any witness, or to any clerk or officer of the House of Commons, upon the trial of any such petition, the Speaker of the said House shall, on application, direct the same to be taxed by such persons and in like manner as by the said recited act (*a*) is directed for the taxing of costs and expenses in all cases where petitions, or the opposition to such petitions, have been declared to be frivolous or vexatious; and the persons so authorized and directed to tax such costs, expenses, and fees, shall and they are hereby required to examine the same, and to report the amount thereof to the Speaker, who shall, on application, deliver to the person or persons concerned a certificate signed by himself, expressing the amount of the fees, costs, and expenses allowed in such report; and the persons so appointed to tax such costs, expenses, and fees, are hereby authorized to demand and receive for such taxation and report such fees as shall be from time to time fixed by any resolution of the House; and the said certificates so signed by the Speaker shall be conclusive evidence of the amount of such demands; and the witness, officer, or party claiming under the same shall, upon payment thereof, give a receipt at the foot of such certificate, which shall be a sufficient discharge for the same." And by sect. 12, "if the petitioner or petitioners who shall have entered into such recognizance as aforesaid (*b*), shall neglect or refuse, for the space of seven days

(*a*) 28 *Geo.* 3, c. 52. (*b*) *i. e.* as provided by sect. 3.

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after demand, to pay to any witness who shall have been summoned on his or their behalf before the House or such select committee, on the trial of the said petition, the sum so certified as aforesaid by the Speaker to be due to such witness, together with the further sum of forty shillings *per diem* for every day during which such petitioner or petitioners shall delay to satisfy the same; or if such petitioner or petitioners shall neglect or refuse, for the space of six months after demand, to pay to any officer of the House, or to any party who shall appear in opposition to their said petition, the sum so certified by the Speaker in pursuance of this act, or of the said recited act of the 28th year of his Majesty's reign, to be due to such officer or party for their fees, costs, or expenses, and that such neglect or refusal shall be proved to the Speaker's satisfaction, by affidavit sworn before any Master of the High Court of Chancery; and such Master is hereby authorized to administer such oath, and is authorized and required to certify such affidavit under his hand; in every such case such person or persons shall be held to have made default in his or their said recognizance, and the Speaker of the House of Commons shall thereupon certify such recognizance into the Court of Exchequer, and shall also certify that such person or persons have made default therein; and such certificate shall be conclusive evidence of such default, and the recognizance being so certified shall have the same effect as if the same were estreated from a court of law: Provided always, that such recognizance and certificate shall in every case be delivered by the clerk, deputy clerk, or one of the clerks-assistant of the House of Commons, into the hands of the Lord Chief Baron of the Exchequer, or of one of the Barons of the Exchequer, or of such officer as shall be appointed by the said Court to receive the same." And by sect. 13, "in any action which shall be commenced for the recovery of any costs, expenses, or fees, which shall have been certified by the Speaker, in pursuance of this act or the said recited act, to be due and payable, such certificate,

so signed as aforesaid by him, shall have the force and effect of a warrant of attorney to confess judgment; and the Court in which such action shall be commenced, shall upon motion, and on the production of such certificate, enter up judgment for the sum specified in such certificate to be due from the defendant or defendants in such action, in like manner as if the said defendant or defendants had signed a warrant to confess judgment in the said action to that amount."

Under this statute the plaintiff obtained from the Speaker the following (*a*) certificate:—" Whereas John Rickman, esquire, clerk-assistant of the House of Commons, and Samuel Compton Cox, esquire, one of the Masters of the High Court of Chancery, who were duly authorized and directed by me, according to the act passed in the 53d year of the reign of his late Majesty King George the Third, intituled, " An Act for amending, &c." to examine and tax the costs and expenses of Mr. Christopher Magrane, cotton-spinner and manufacturer, *a witness summoned by and on the behalf of Lieutenant Colonel Henry White, one of the sitting Members for the County of Dublin* (*b*), incurred by the said Christopher Magrane in attending *as a witness for and on the behalf of the said Henry White* (*c*), to give evidence before the select committee appointed to try and determine the merits of the petition of George Rigney and others, complaining of an undue election and return for the *said* county of Dublin, *have examined and taxed the said costs and expenses of the said Christopher Magrane, and* have reported to me the *taxed* amount thereof; *such examination and taxation having been attended by the attorneys or agents of the said Christopher Magrane and Henry White:* Now I do hereby certify that the said *taxed* costs and expenses of the said Christopher Magrane do amount to the sum of 47*l.*, which sum I do hereby further certify to be due and payable from and by the said Henry White, as

(*a*) Originally without the words in italics, *post*, 444, (*a*).

(*b*) *Post*, 445.

(*c*) *Ibid.*

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such sitting member as aforesaid, to the said Christopher Magrane, as such witness as aforesaid: And I do hereby further certify, that the fees due and payable upon such taxation do amount to the sum of 9*l.* 14*s.* 8*d.*, which last-mentioned sum, making together with the aforesaid sum of 47*l.* the sum of 56*l.* 14*s.* 8*d.*, I do further certify to be due and payable from and by the said Henry White to the said Christopher Magrane, the same being charged against the party at whose instance the said Christopher Magrane was summoned to attend the said select committee; but which sum of 9*l.* 14*s.* 8*d.*, I do lastly certify, hath in the first instance been paid by the said Christopher Magrane, in order to obtain this certificate. Given under my hand this 15th day of June, 1828." Signed, "*Charles Manners Sutton*, Speaker."(*a*) Upon this certificate

Starkie moved for leave to enter up judgment. The question intended to be raised is as to the jurisdiction of the Court

(*a*) This application was first made in Hilary term, 1828, when the rule was refused by *Holroyd*, J. the only Judge in Court, for want of an affidavit verifying the Speaker's signature. This defect having been cured, and a rule *nisi* obtained, but the certificate being without the words in italics,

Law shewed cause. The certificate is insufficient, as it does not state the party at whose instance he was summoned. [Lord *Tenterden*, C. J. Has an action been brought?] It has.

Starkie in support of the rule. The statute directs that the certificate shall have the force of a warrant of attorney. It does not require that the certificate should state to whom the costs are to be paid, nor by whom the witness was summoned. Perhaps the Speaker has no power to interfere upon these points. This power may be limited to the ascertaining of the amount. [Lord *Tenterden*, C. J. How would it appear who is to pay?] That is certainly not stated in the affidavits; but it was not expected that any such objection would be taken. Then the intention of the statute was to provide a general tribunal, and it applies as well to witnesses summoned by the sitting member, as to those summoned on behalf of the petitioner.

Lord TENTERDEN, C. J.—We have nothing before us to shew that the money is payable by the defendant.

LITTLEDALE, J.—The party should be named in order to make the certificate applicable to the action.

Rule discharged.

and the Speaker; whether, under the 7th section, the Speaker has power to certify when the witness is summoned on the behalf of the sitting member. This section is general in its terms. It speaks of payment to any witness, without distinguishing between witnesses who appear for the petitioners or the sitting member. It was meant to provide for vexation in all cases. It was thought better to submit it to the Speaker and clerks. By the 9th section, the party opposing may recover his costs. In order to give the sitting member his expenses, it was necessary to give the Speaker power to ascertain the amount. The recognizances are conditioned for payment of the costs of *all* witnesses. The remedy for the petitioner's witnesses is very simple under the 12th section. The sitting member of course enters into no recognizances, therefore a provision is made by the 13th section.

Adam and *Law*, contrà (*a*). The effect of the motion would be to give to a party suing the benefit of a warrant of attorney, without affording the party sued any opportunity of contesting the question whether he was summoned or not. The Speaker, indeed, states that the plaintiff was summoned, but the officers will not allow that to be contested. It is the daily practice to grant the certificate without inquiring whether the party was summoned or not (*b*). By the 28 *Geo.* 3, c. 52, no such extraordinary powers were granted, there the party must bring his action. The statute of the 53 *Geo.* 3, is the first statute which gives costs to witnesses upon election petitions, and directs that a recognizance shall be entered into within a certain period. [Lord *Tenterden*, C. J. That recognizance is a mode of enforcing payment by the petitioner. *Bayley*, J. You would say that if a clerk act for the sitting member, no authority is given to certify.] It is submitted that the statute applies exclusively to the case of a petitioner. The

(*a*) The argument came on now upon the motion for the rule *nisi*, by consent.

(*b*) This, perhaps, accounts for the omission in the original certificate, *ante*, 443, (*b*), 444, (*a*).

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plaintiff contends that the recital is not confined to costs, expenses, and fees payable by a petitioner; but the 28 *Geo.* 3, c. 52, applies only to party and party, and the present act does not embrace a case where the question is, whether the party is witness or not. No power is given to the Speaker to ascertain the fact which is to give him jurisdiction, or to depute that inquiry to others. Looking at the third section, it appears that the case of a petitioner alone was in contemplation. To what is that a preamble? [Lord *Tenterden*, C. J. Why are we to consider that as a preamble to the third section only? *Bayley*, J. Of course a recognizance entered into by the petitioner can apply to his costs only.] Never from first to last is any mention made of the sitting member. [*Bayley*, J. Nothing can arise as to the petitioner which may not arise as to the sitting member. You must contend that no power is given to ascertain the amount of expenses, even in the case of a witness for a petitioner.] The Speaker is merely to ascertain the amount. It would be strange if the trial of an issue of fact should be deputed to an officer who has no power to inquire. The sitting member is not bound by a recognizance.

Starkie in reply. It is quite clear that the legislature meant the certificate to be conclusive in case of the petitioner. If any doubt exist as to the summons, it can be produced. [Lord *Tenterden*. That we cannot enter into.] The preamble is general. [*Bayley*, J. The provision in the 13th section would be useless, if you have a remedy under the recognizance.] The argument on the other side goes too far, as the officer could not be benefited in any case.

Lord TENTERDEN, C. J.—The Court is bound, on production of the certificate, to order judgment to be entered up for the amount certified to be due. Two objections have been made. No inquiry is said to have been gone into whether the party was summoned as a witness or not. That objection would apply equally whether the party is

alleged to have been summoned as a witness for the petitioner or for the sitting member. We are bound to presume that the Speaker does not certify to us, without having made due inquiry; if the practice is otherwise, it ought to be corrected (*a*). The second objection is, that the statute applies only to witnesses summoned for the petitioners. The words of the seventh section are general, "any person summoned." Notwithstanding this generality, if we could see from the rest of the act that these words were intended to be restrained to persons summoned on the part of the petitioner, the Court would be bound to give it the more limited construction. I find no words from which such a restriction can be inferred. It is said that the preamble applies only to the third section. The words of recital are as general as those in the 13th section. Instead of the words "payment of all costs, expenses, and fees which shall become due to witnesses, officers of the House, and parties, by reason of the trial of controverted elections," I should have expected to find "payment by persons petitioning," if the intention had been so to restrict the operation of the statute. I know no rule of construction which compels us to apply the recital in the particular section to that section only. There is nothing to exclude the application of this preamble to the whole act. There is no enumeration of sections by the legislature. If we held otherwise, we must say that the act has done only half of that which it was intended to effect: that we cannot suppose.

BAYLEY, J.—The question is, whether witnesses on both sides are within the statute, or whether one rule is to obtain for witnesses and officers when called on behalf of the petitioner, and another when called on behalf of the sitting member. Indeed the objection urged by Mr. *Adam* applies equally to both; that objection, therefore, may be left out of consideration. It is said that the recital in the third section is limited to the petitioner; but the preamble

(*a*) *Ante*, 443, (*b*), 444, (*a*), 445, (*b*).

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is general, though the section itself is limited; and the seventh section is general. When you look at the 12th and 13th sections, you find an intention to provide for the witnesses on both sides. If the amount be not paid within six months, you may estreat the recognizance, and apply to the Court of Exchequer. There are other officers not provided for by the recognizance; the remedy by action is introduced for their benefit also. The act applies to remedy the whole inconvenience which was previously sustained.

LITTLEDALE, J.—I am of the same opinion. The third section says, that provision should be made for all costs, but gives a limited remedy. In those sections which speak of the petitioner, it was not likely that a provision would be made for the witnesses called by the sitting member. The seventh section is more general.

Rule absolute.

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Under 5 *Geo.* 4, c. 106, s. 21, where a verdict is found for less than 50*l.*, it is in the discretion of the judge who tries the cause, whether he will *testify* that the cause of action arose in Wales, and that defendant was resident there at the time of the service of process; and his decision cannot be revised by the Court.

ACTION for goods sold and delivered. At the trial before Lord *Tenterden*, C. J., at the sittings at Westminster, after last Easter term (*a*), the following facts appeared. Goods to the amount of 9*l.* were sold, and the delivery took place within the principality of Wales, where the defendant's residence then was, and where he had *generally* resided ever since. A verdict having been found for 9*l.* the counsel for the defendant applied to the learned Judge to certify that the cause of action arose within the principality, and that the defendant resided there at the time of the service of the writ; which his lordship refused to do,

(*a*) Counsel for the plaintiff, *Justice*; for the defendant, *Brougham*.

Lord *Tenterden*, C. J., refused to testify, where the evidence was merely that the defendant's *usual* place of residence was in Wales.

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on the ground that the defendant had not shewn that at the time when he was served with process he was actually residing in Wales, under 5 *Geo.* 4, c. 106, s. 21, which enacts, " that in all actions upon the case for words, actions of debt, trespass on the case, assault and battery, *or other personal actions*, and all transitory actions which, from and after the 6th of November, 1824, shall be brought in any of his Majesty's Courts of Record out of the principality of Wales, and the debt or damages found by the jury shall not amount to the sum of 50*l.*, and it shall appear upon the evidence given at the trial of the said cause, that the cause of action arose in the said principality of Wales, *and that the defendant or defendants was or were resident in the dominion of Wales, at the time of the service of any writ or other mesne process served on him, her, or them, in such action*, and it shall be so testified under the hand of the judge who tried such cause, upon the back of the record of *nisi prius*, (on such facts being suggested on the record or judgment roll,) a judgment of nonsuit shall be entered thereon against the plaintiff or plaintiffs; and the plaintiff or plaintiffs shall pay to the defendant or defendants in such action, his, her, or their costs of suit; and the defendant and defendants shall have the like remedy to recover the same as in the case of a verdict given for the defendant or defendants in such action; and in the taxation of all costs allowed and given to the defendant or defendants, the proper officer shall allow to the plaintiff or plaintiffs, out of the defendant's costs, the full sum given by the verdict to the plaintiff or plaintiffs for his, her, or their debt or damages; and although no judgment shall be entered for the plaintiff or plaintiffs upon such verdict, yet nevertheless such verdict, without any judgment entered thereon, shall be an effectual bar to any action or actions commenced in any Court whatsoever, by the plaintiff or plaintiffs, for the same."

Brougham now moved to enter a nonsuit, on the ground

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that the damages recovered did not exceed 50*l*. Proof that the defendant's usual place of residence was Wales, at the time of the service of the writ, was sufficient, without shewing that he was in the principality at the time of the service. Suppose a party lives on the borders, and comes occasionally into an English county, the party, though served whilst in the English county, would be resident in Wales within the meaning of the statute. [Lord *Tenterden*, C. J. The words of the act are, "and it shall be so testified."] Where the certificate merely governs the costs, it is different; but here the certificate governs the nonsuit.

Lord TENTERDEN, C. J.—The Court cannot be called upon to revise the decision of the Judge who tried the cause, in the exercise of the discretion vested in him by the statute, which only applies to cases where the Judge thinks that it was proper that the cause should be tried in Wales.

Rule refused.

BIGGS and others, Assignees of COLLIER, a Bankrupt, *v.* FELLOWS.

In contemplation of a dissolution of partnership between *A.* and *B.*, a warrant of attorney is given by *C.* to *A.* to secure a debt owing from *C.* to *A.* and *B.* Before the partnership is actually dissolved, *C.* commits an act of bankruptcy. A sum paid by *C.* to *A.* after the dissolution of partnership, on account of the debt, and a further sum levied under an execution against *C.*'s goods, are money received by both *A.* and *B.* to the use of the assignees of *C.*

ACTION for money had and received by defendant and one *Tatlock*, deceased, to the use of plaintiffs, as assignees. At the trial before Lord *Tenterden*, C. J., at the sittings at Guildhall after last Michaelmas term (*a*), the following facts appeared. In August, 1821, *Fellows* and *Tatlock*, being holders of a dishonoured acceptance of *Collier's*, *Tatlock*, the managing partner, by whom the partnership concerns

(*a*) Counsel for the plaintiffs, Sir *J. Scarlett* and *R. V. Richards*; for the defendant, *Denman* and *E. H. Alderson*.

were about to be wound up, obtained from *Collier* a warrant of attorney to confess a judgment to *Tatlock*, to secure payment of the amount of the acceptance by instalments. In October, 1821, *Collier* committed a secret act of bankruptcy. *Tatlock*, however, knew *Collier* to be insolvent, and demanded further security; in consequence of which, in November, 1821, *Collier* sent goods to the warehouse of *Fellows* and *Tatlock*, where they remained until *Fellows* and *Tatlock* dissolved partnership, January 1, 1822. In March, 1822, *Tatlock* received from *Collier* 110*l.* on account, and in Michaelmas term, 1822, obtained 44*l.* under a *fieri facias*, *Tatlock* alone indemnifying the sheriff. The commission issued in January, 1823. *Tatlock* died in November, 1823. It was contended on the behalf of the defendant, that the 110*l.* having been paid, and the 44*l.* having been levied under a warrant of attorney and judgment, in which *Tatlock* only was named, those sums must be considered as received by *Tatlock*, and that no liability survived to the defendant. The learned Judge ruled that the plaintiffs were entitled to recover these two sums, giving the defendant leave to move to enter a nonsuit. In the following term *Denman* obtained a rule *nisi*, according to the liberty reserved.

Sir *J. Scarlett* and *R. V. Richards* now shewed cause. Payment to the party who was to wind up the partnership concerns, was payment to both. If, therefore, the payments were wrongfully made to him, the remedy would be against the survivor. The question is, whether the taking of a warrant of attorney makes any difference. It is common, in case of bankers, to take securities in this form. The warrant of attorney was received on account of *Tatlock* and *Fellows*, though made to *Tatlock* alone; there being a joint transaction commenced before the dissolution of the partnership, the effect of the partnership continued after the dissolution, *Bedford* v. *Deakin* (*a*). It was a question

(*a*) 2 B. & A. 210; 2 Stark. N. P. C. 178.

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of fact on what account the payments were made. There was no evidence that *Tatlock* and *Fellows* had ever settled accounts together, or given releases.

Denman and *Alderson*, contrà. There was no evidence of any liability of the surviving partner. Both sums were received by *Tatlock* alone after the dissolution of the partnership, and he alone indemnified the sheriff. In *Kilgour* v. *Finlayson* (*a*), where, upon the dissolution of a partnership between *A. B.* and *C.*, *A.* was authorized to receive and pay the debts, it was held that *B.* and *C.* were not bound by a bill subsequently drawn and indorsed by *A.* in the partnership firm, although the proceeds were applied in satisfaction of a partnership debt. In *Pender* v. *Wilks* (*b*), it was held that the delivery of goods without payment of freight would not raise an implied assumpsit against three persons for whose use the cargo had been purchased, but who had assigned their effects to a trustee for the benefit of creditors. It does not appear that the defendant authorized or recognized the acts of *Tatlock*, or was in any way benefited by them.

Lord TENTERDEN, C. J.—I am of opinion that this rule must be discharged. It appeared at the trial, that *Collier* being indebted to *Tatlock* and *Fellows* in 321*l.* upon a bill, application was made to *Collier* for payment. The attorney informed *Tatlock* that the partnership was about to be dissolved, or that a dissolution was in contemplation. *Tatlock* told *Collier*, that if he would give a warrant of attorney, he might have time. A warrant of attorney was accordingly given in August, 1821. The dissolution of partnership did not take place until December. If the action had been brought immediately after the warrant of

(*a*) 1 H. Bla. 155. And in *Abel* v. *Sutton*, 3 Esp. 108, 112, Lord *Kenyon* seems to have been of opinion that *B.* and *C.* would not have been bound by an indorsement made whilst the partnership subsisted, if the security had not been negotiated until after the dissolution.

(*b*) 5 Taunt. 612; 1 Marsh. 248.

attorney had been given, undoubtedly both might have sued. The judgment alone would not effect any alteration in the right to receive the money as between themselves. The money, therefore, though paid in pursuance of the warrant of attorney, or, if you please, of the judgment, is received as a payment to both.

BAYLEY, J.—If the money, though paid into the hand of *Tatlock*, was received by him in the character of partner, *Fellows* would of course be liable. Then it was incumbent on *Fellows* to shew that there existed that between him and *Tatlock* which made the money, when received, *Tatlock*'s. Nothing was proved for the purpose of raising that inference, except the warrant of attorney to confess a judgment to *Tatlock* only. But that does not prove that the money secured by the warrant of attorney was to be the separate money of *Tatlock*. *Tatlock* receiving a warrant of attorney to secure a debt due to *Tatlock* and to *Fellows* must *primâ facie* be taken to have received it for the partnership, and he would have been liable to account with *Fellows* in respect of the proceeds. If, upon the dissolution of partnership, the bargain had been that *Tatlock* should keep the money on his own account, *Fellows* might have proved that by way of defence. In the absence of such evidence it was rightly considered that the two sums were money received to the use of *Tatlock* and *Fellows*.

HOLROYD, J.—Unless the money was paid upon a separate debt due to *Tatlock*, it would be joint property, though paid into the hands of *Tatlock*. One partner may take a security for both in his own name, and he will be a trustee.

LITTLEDALE, J. concurred.

Rule discharged (*a*).

(*a*) And see *David* v. *Ellice*, 7 D. & R. 690; 5 B. & C. 196; *Booth* v. *J. Quin*, 7 Price, 193; *Wills* v. *Ross*, 7 Taunt. 403; *Lodge* v. *Dicas*, 3 B. & A. 611. A similar rule pending in an

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action of trover between the same parties, for the value of the goods delivered by *Collier* to *Tatlock* in November, being after the act of bankruptcy, and before the dissolution of partnership, was discharged, without calling upon the counsel for the plaintiff, the delivery of the goods being originally to the two partners, and the custody and the interest continuing unchanged down to the time of the final conversion by sale.

The KING (on the Prosecution of JOHN SPURGING) *v.* GILKES and others.

Upon the trial of an indictment for disobeying an order of justices, the recital upon the face of the order, of the facts giving the magistrates jurisdiction, is not evidence of the existence of such facts.

Nor is the setting out of the order in *hæc verba*, in the indictment, a sufficient allegation of the truth of the facts recited therein.

THE indictment stated, that on the 21st day of March, in the 8th year of the reign of our lord the now king, at the Police Office, Worship Street, in the parish of St. Leonard, Shoreditch, in the county of Middlesex, *William Bennett* and *Samuel Twyford*, Esquires, two of the justices of our said lord the king, assigned to keep the peace of our said lord the king, in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and misdemeanours committed in the same county, did, in due form of law, make an order, under their hands and seals, which order is as follows:—

"Middlesex to wit:—To *William Gilkes*, *Sylvanus Ward*, *Robert Carpenter*, *George Bowden*, *James Hubbard*, and *James M'Kean*, stewards of a friendly society, called the Alfred Union Benefit Society, held at the sign of the Angel and Crown, the corner of Crispin Street, in the parish of Christ Church, in the county of Middlesex, and to each of them, and to all and every other member and members of the said society; whereas *George Spurging*, of the parish of Christ Church aforesaid, in the county of Middlesex, on the 19th day of March instant, at the police office in Worship Street, Shoreditch, in the said county of Middlesex, came before us, *W. Bennett* and *S. Twyford*, two of the justices of our said lord the king, aforesaid, assigned to keep the peace of our said lord the king, in and for the county of Middlesex, and also to hear and

determine divers felonies, trespasses, and other misdemeanours, in the said county committed, near unto the place where the said society is now established, and made complaint upon oath, that he, the said *G. Spurging*, having been duly admitted a member of the said society, established pursuant to the statutes in that case made and provided, thought himself aggrieved by a certain act done by the said society in being excluded from the benefit of the said society, contrary to the rules, orders, and regulations of the said society; *and it appearing to us, the said justices, that the said rules, orders, and regulations had been allowed and confirmed* by the justices of the peace for the county of Middlesex, assembled at the general quarter sessions of the peace holden in and for the said county of Middlesex, according to the directions of the said statutes, we, the said justices, did duly issue our summons to the stewards of the said society, they being the principal officers of the said society, to appear before us the said justices, and answer the complaint so made by him the said *G. Spurging*, as aforesaid; and thereupon, in pursuance of such summons, the said *S. Ward* one of the said stewards, and *R. Cole* the president, with other members of the said society, do appear before us this 21st day of March, in the year of our Lord 1827, at the police office in Worship Street, Shoreditch, in the county of Middlesex; and we the said justices, in the presence of the said *S. Ward* one of the stewards, *R. Cole* the president, and others, members of the said society, proceed peremptorily to hear and determine in a summary way the matter of such complaint, according to the true intent and meaning of the said rules, orders, and regulations, and after hearing the allegations of the said *G. Spurging* upon oath, and the allegations of the said *S. Ward, R. Cole* the president, and others, members of the said society, touching the premises, and duly considering such allegations, we the said justices do hereby adjudge, and make order, that the said *S. Ward* one of the stewards, *R. Cole* the president, and others, members of the said

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society, do immediately, on sight hereof, restore and readmit the said *G. Spurging* to be a member of the said society. Given under our hands and seals, at the police office in Worship Street, Shoreditch, in the county of Middlesex, this 21st day of March, 1827.

WILLIAM BENNETT, (L. S.).
SAMUEL TWYFORD, (L. S.).

"Of which order the said *W. Gilkes, S. Ward, R. Carpenter, G. Bowden, J. Hubbard,* and *J. M'Kean* afterwards, to wit, on &c., at &c., had due notice. Nevertheless the said *W. Gilkes,* late of &c., labourer; *S. Ward,* late of &c. labourer; *R. Carpenter,* late of &c., labourer; *G. Bowden,* late of &c., labourer; *J. Hubbard,* late of &c., labourer; and *J. M'Kean,* late of &c., labourer; afterwards, to wit, on &c., at &c, unlawfully and contemptuously did neglect and refuse, and still do neglect and refuse, to restore and readmit the said *G. Spurging* to be a member of the said society, as by the said order the said *W. Gilkes, S. Ward, R. Carpenter, J. Hubbard, G. Bowden,* and *J. M'Kean* were required to do; in contempt of our said lord the king and his laws, to the evil example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity."

The indictment also contained counts in which the order for the readmission of *G. Spurging* was stated by way of recital instead of being set out in *hæc verba* as was done in the first count; but there was no count in the indictment containing a positive allegation that the rules of the society had been inrolled. At the trial before Lord *Tenterden,* C.J., at the sittings at Westminster after last Michaelmas term (*a*), the order of justices was given in evidence by the prosecutor, who relied upon the recital in that order as proof that the rules and regulations of the society had been duly inrolled at the sessions. On the part of the defendants it was con-

(*a*) Counsel for the prosecution, Sir *James Scarlett* and *D. Pollock*; for the defendants, *Reader* and *Adolphus*.

tended, that it was incumbent on the prosecutor to prove that the rules and regulations had been in fact inrolled, without which inrolment the magistrates had no power to make the order set out in the indictment. Lord *Tenterden*, C. J. directed the jury to find the defendants guilty, reserving liberty for the defendants to move to enter a verdict of acquittal.

In Hilary term last, *Adolphus* obtained a rule to shew cause why a verdict of acquittal should not be entered, or why the judgment should not be arrested.

Sir *J. Scarlett* and *D. Pollock* shewed cause. The order being good upon the face of it, it lay upon the defendants to shew that the provisions of the statute had not been complied with. The distinction is between orders and convictions. Upon convictions, the facts necessary to support it must appear. Upon orders, all necessary facts must be presumed, unless the contrary be made appear. The onus was cast upon the defendants. *The King* v. *Clayton* (*a*). [Lord *Tenterden*, C. J. That was an application to quash an order. It is one question, whether you can set aside an order, and another, whether you can enforce it.] No case has been cited where upon an indictment for disobeying an order, it has been held necessary to shew all the facts upon which the order proceeded.

Reader and *Adolphus*, contrà. It is necessary to shew that the justices had jurisdiction. By 33 *Geo.* 3, c. 54, s. 2, no friendly society shall be within the meaning of that act "until good and competent rules, orders, and regulations for the government of the same shall have been confirmed by the justices, and filed according to the directions of that act." [Lord *Tenterden*, C. J. The association would be nothing without the inrolment.] It is supposed that this is supplied by the recital in the order, but it was the recital

(*a*) 3 East, 58.

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of a fact which was necessary to give the magistrates jurisdiction (*a*). The inrolment is the substratum of the whole proceeding, and this proceeding is final and conclusive, admitting of no appeal to the quarter sessions. The prosecutor, therefore, ought to be held to strict proof. [Lord *Tenterden*, C. J. You admit the order to be good, so that it could not be quashed on a certiorari. *Bayley*, J. Disobeying the order is no offence, unless there were jurisdiction.]

Lord TENTERDEN, C. J.—There is one very general rule, though not a universal one, that a party cannot be convicted of an offence, unless that offence be charged in the indictment, and established by legal proof. Here it was necessary to shew that the magistrates had authority to make the order, which they had not, unless the rules of the society were inrolled; but the indictment contains no allegation of such inrolment. Nor was there any legal evidence of the inrolment; for the recital of it in the order of justices was not legal evidence of the fact as against the defendants. The rule will be to arrest the judgment.

BAYLEY, J.—The prosecutor has proved every thing which was alleged in the indictment, but the indictment did not allege enough.

The other Judges concurred.

Rule absolute for arresting the judgment.

(*a*) See *Rex* v. *All Saints*, 1 M. & R. 663, 668; *S. C.* 7 B. & C. 785.

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The President, Directors, and Company of the Bank of the State of SOUTH CAROLINA, in the United States of AMERICA, *v.* JOHN ASHTON CASE, JOHN JACKSON, and WILLIAM BROWN, Assignees of the Estate and Effects of THOMAS CROWDER and HENRY THOMAS PERFECT, Bankrupts.

THIS was an issue directed by the Vice-Chancellor, to try whether *Thomas Crowder* and *Henry Thomas Perfect*, the bankrupts, and *James Butler Clough*, were, on the 13th August, 1825, the date of the commission of bankrupt against *Crowder* and *Perfect*, indebted to the plaintiffs in any and what sum of money. The issue stated a promise by the defendants to pay the plaintiffs one shilling for every pound of the debt which might be due to the plaintiffs, and averred 15,000*l.* to be due. The cause was tried before *Hullock*, B., at the assizes for the county of Lancaster, when a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case.

On the 3d November, 1815, *Clough* entered into articles of co-partnership with *Crowder* and *Perfect*, the bankrupts, whereby they agreed to carry on the trade or business of consignees or factors for persons trading from the United States of America to England, and such other branches of business as they should mutually agree upon, in co-partnership, for the term of four years from the 1st January then next; and by a clause in the articles it was declared that the firm of the partnership should be "*Crowder, Clough*, and Co." It was also stipulated by the articles that *Perfect* should forthwith proceed to America to advance the business of the concern as consignees or factors, and in such other manner as might best answer the purposes of the partnership; that no one of the partners should carry on or be concerned in the business on his own separate account, nor carry on any trade in

A., *B.*, and *C.*, carried on business in partnership as factors, *A.* and *B.* in England under the firm of *A.*, *C.*, and *Co.*, and *C.* in America in the name of *C.* only. *C.* had written instructions from his partners, stating, "it is understood that our names are not to appear on either bills or notes for the accommodation of others, and that they should appear as little as possible on paper at all, and then only as regards direct transactions with the house here." *C.*, having obtained a consignment from *D.* in America, indorsed bills in his own name for him, to provide for which *B.* drew other bills on *A.*, *C.*, and Co. in England, which were to be paid out of the proceeds of the consignment. Before the latter bills were presented for acceptance, *A.* and *B.* became bankrupts:—Held, that the indorsement of the first bills by *C.*, was the indorsement of the firm, and that all the partners were liable as indorsers of those bills.

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partnership with any other person during the said term, nor carry on any trade or business on his own account, distinct from the said partnership, nor carry on any in the name or firm of the said partnership, or on account thereof, without the consent in writing of each of the parties. That proper books of account should be kept in England and in America while *Perfect* was resident there, in which respectively should be fairly entered and kept the accounts, dealings, and concerns relative to the aforesaid partnership transactions. *Perfect* went accordingly, and transacted business in America for the partnership, but it was all done in his name. He returned in 1819, and by an agreement bearing date 9th October, 1819, the partnership was extended two years upon the former terms, except in some particulars not affecting the present question; and the parties agreed that they would continue to carry on the business for that time, and such other branches of business as they should from time to time mutually agree upon; and it was agreed that *Perfect* should have a yearly allowance of 600*l.* for such time as he should stay in America on the partnership account. *Perfect* again proceeded to America, where he continued two years, transacting the partnership business in his own name. On his return in 1821, it was agreed that the term of the co-partnership should be again extended two years, and that the parties should continue to carry on the business, and such other branches of business as they should mutually agree upon for that term; and that *Clough* should succeed *Perfect*; and a supplementary agreement was entered into, bearing date 27th October, 1821, upon the like terms as the former articles, except as thereby altered in some matters not affecting the present question. And it was agreed that *Clough* should proceed to America, and use his best endeavours for the general benefit of the concern, and should have a yearly allowance of 500*l.* for such time as he should remain in America on the partnership account. Previously to *Clough*'s departure written instructions were given him for his conduct in America. They bore date 29th October,

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1821, and were signed by *Crowder* and *Perfect*, and they were approved of as a guide for the future conducting of business. In the instructions were the following paragraphs:—" No shipments to be made solely on our account, but the above price to regulate shipments in conjunction with other parties, when they require us to participate in the risk to induce them to make a consignment. It is to be hoped, however, that there will be no necessity to extend this sort of business, and that it will be as much avoided as possible. Our main object is consignments, either of ships or produce; and with a view to secure such, should we be induced to risk a share of shipments, (if such can be had without, we should prefer it,) we should not wish a larger sum than 5000*l.* to be risked, even in the smallest degree, at any one time, in such participations; and the result of these shipments ought to be known, or safely calculated on, by advices from home, before any new arrangements are formed. It is understood that our names are not to appear on either bills or notes for the accommodation of others; and that they should appear as little as possible on paper at all, and then only as regards direct transactions with the house here." The business of *Crowder, Perfect,* and *Clough,* was that of factors or commission merchants for principals trading between England and America. Their business in this country consisted principally in the purchase and sale of goods, and the collection of freights for principals in America on commission. Their business in America consisted in the purchase and sale of goods, and in the collection of freights for their principals in England, on commission, and occasionally in the purchase of cotton, jointly with others, to secure a consignment; and sometimes *Clough* purchased cotton on speculation, notwithstanding the clause in the instructions, " that no shipments were to be made solely on their account;" and in the course of this business *Clough* occasionally purchased and sold bills of exchange. In England the business of the house was carried on in the name of *Crowder, Clough* and Co.; in America all the part-

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nership business was transacted in the name of *Clough* alone. The bankrupts in England, and *Clough* in America, procured consignments for their joint benefit on commission; the bankrupts as to consignments to America for sale by *Clough*, and *Clough* as to consignments to England for sale by the bankrupts; *Clough* using his own name only in these, as well as all other transactions in America. In order to obtain consignments from America, the bankrupts and *Clough* made advances, or granted drafts or bills of exchange, or indorsements thereof, to their principals in America, upon the security of such principals' goods consigned to the bankrupts and *Clough* for sale in England; and the business relating thereto was conducted as follows: —first, in some cases, bills of exchange were drawn in the name of *Clough* upon *Crowder, Clough* and Co., in favour of their principals, and were delivered to such principals; secondly, in many other cases, bills of exchange were drawn by the principals upon *Crowder, Clough* and Co., and indorsed in the name of *Clough*, and delivered to the principals with such indorsements; thirdly, in other cases, bills of exchange were drawn by *Clough*, in his own name, upon *Crowder, Clough* and Co., and indorsed by him, and sold, and the proceeds advanced to the consignors: fourthly, in other cases, *Clough* used to raise money for advances to consignors by drawing upon American houses in New York, or by the consignors drawing on them, and *Clough* provided for these bills by sending to the American houses bills on England to be discounted there; bills on England not being always negotiable at Charlestown. Consignments of cotton were procured by *Clough* by means of these transactions to the English house for sale, on account of the consignors, to a very large amount. *Clough* also bought and sold bills of exchange in his own name on speculation, the profit and loss whereof was carried to the partnership account. *Clough* also purchased and sold goods in America in his own name, for English principals, to a large amount. The profits made by the partnership in America, in commission and exchange

speculations, in the name of *Clough*, were very considerable, amounting in 1822 to 1,377*l.*, in 1823 to 2,700*l.*, in 1824 to 5000*l.*, but in 1825 there was a loss. Proper partnership books were kept: the bankrupts entering in their books all the dealings and transactions in this country, and *Clough* entering in his books all the dealings and transactions in America. At the end of each year the annual balance of profit and loss in England and in America was divided between the partners. *Clough*, during the whole time that he was in America, namely, from 1821 to the bankruptcy, never traded or drew, indorsed, accepted, or negotiated any bills of exchange, or carried on any business, on his own account. But he entered into a joint speculation, intending it to be on the partnership account, with two persons, *J. T. Weyman* and *M. Lazarus*, in his own name, to the extent of 100,000*l.* and upwards, notwithstanding the clause in the instructions, "we should not wish a larger sum than 5,000*l.* to be risked, even in the smallest degree, at any one time in such participations." This transaction was afterwards adopted by the bankrupts. He had no individual business whatever, and the name of *Clough* was never used by him in trade, or in drawing, indorsing, accepting, or negotiating bills of exchange, except for the benefit and on account of the partnership; and all the partnership business in America was carried on in that name and no other, save when the consignors of goods drew bills of exchange on England on account of their consignments; in which cases they always drew on *Crowder, Clough* and Co. *Clough* was restricted by the partnership articles from transacting any business there in any manner whatever, except on the partnership account. *Clough*, who was the only witness examined on either side at the trial, swore that there was no specific agreement between him and his partners that there should be a house under the name of *Clough* in America; that he was sent out to form a branch of the house in America; that he had instructions not to use their name; that he had

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no doubt that they intended he should form a branch of the house, and that the branch was carried on in America in the name of *Clough*, with the sanction of all the three partners, although there was no specific agreement that it should be so carried on. *Clough* obtained from *Weyman* of Charlestown consignments of a large quantity of cotton to the house of *Crowder*, *Clough* and Co. for sale on *Weyman*'s account, and it was agreed between *Weyman* and *Clough*, that *Weyman* should draw bills upon *Coffin* and *Weyman*, of New York, merchants, payable to *Clough*, and that *Clough* should indorse them; it being understood between them that the Carolina Bank would discount such bills, in order to make advances to *Weyman* on the credit of the consignments. Four bills were accordingly drawn by *Weyman* on *Coffin* and *Weyman* for 40,000 dollars, payable to *Clough*, or order, and being indorsed by *Clough* were discounted by the plaintiffs, who are a banking corporation duly constituted by the laws of America. It was further agreed between *Clough* and the consignor *Weyman*, that the latter should draw other bills on *Crowder*, *Clough* and Co., in order to provide *Coffin* and *Weyman* with cash to pay the four bills on them, when at maturity, which latter bills were to be paid by *Crowder*, *Clough* and Co., out of the proceeds of the consignments in their hands. Bills were accordingly so drawn to the amount of 5,000*l*. These were sold by *Coffin* and *Weyman*, who shortly afterwards stopped payment, and the proceeds of the bills were misapplied. *Crowder*, *Clough* and Co.. soon afterwards failing, the bills upon them were not paid. All the consignments, however, agreed to be made by *Weyman* to the house in England, were made, and were received by the English house, and disposed of by them. Bills on England are not, in general, negotiable in Charlestown; this was the cause of the arrangement for drawing bills in the first instance on *Coffin* and *Weyman*. The bills in question were duly presented to *Coffin* and *Weyman* at maturity, and dishonoured, and due notice given to *Clough* in America. The

value of the bills in question, in English money, is 8,333*l.* 6*s.* 8*d.* These particular bills were not entered by *Clough* in the books kept by him, because the agreement with *Weyman* was that bills were to be drawn on *Crowder Clough* and Co. to such an amount as precisely to raise the amount of the four bills on *Coffin* and *Weyland* and thereby exactly reimburse their payments, and as the bills so drawn would be paid in England out of the proceeds of the consignments, no profit or loss could arise to *Clough* or his partners from the sale of these bills on *Coffin* and *Weyland* in America, and, therefore, no entry was made by *Clough* in the books kept by him. *Clough* had no separate estate. If the plaintiffs are entitled to recover, a verdict is to be entered for 416*l.* 13*s.*, the amount of the debt due from *Crowder Perfect* and *Clough* being 8,333*l.* 6*s.* 8*d.*; if not, a nonsuit is to be entered.

Parke for the plaintiffs. Although the bills in question were indorsed in the name of *Clough* alone, it is clear that they were indorsed in the course of the partnership business of *Crowder Clough* and Co., and for partnership purposes; therefore the only question in the case will be, whether the signature of *Clough* must be taken as his individual signature, making him individually liable, or as the signature of the firm, binding all the partners. The case expressly finds that all the business of the firm was carried on in the name of *Clough* only, and there is no legal objection to such a course of proceeding. Undoubtedly, the indorsement of one partner does not make the firm liable, even where the money is applied to partnership purposes, if the indorsement cannot be considered as the indorsement of the firm; *Emly* v. *Lye* (*a*) and *Ex parte Emly* (*b*); but, on the other hand, a firm consisting of several partners may carry on their business in the name of an individual partner, and acts done by him as the representative of the firm will bind the whole firm. *Ex parte Bolitho* (*c*). The short question, therefore, is, whether the signature of *Clough* to these bills may not

(*a*) 15 East, 7. (*b*) 1 Rose, 61. (*c*) Buck, 100.

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be considered as the signature of *Crowder Clough* and Co. It is confidently submitted that it must be so considered, for all the business in America was carried on in the name of *Clough* only, with the knowledge and approbation of the partners in England, and the transaction in question was entered into on account and for the benefit of the partnership. In *Denton* v. *Rodie* (*a*), where one of several partners, with the privity of the others, drew bills in his own name in favour of persons who advanced him the amount, which he applied to the use of the partnership, it was held that, although the partners were not jointly liable on the bills, yet they might be jointly sued by the payees for money lent: and the facts in that case were not so strong as those in the present.

Patteson, contrà. The name of *Clough* in this case represented the individual only, and is binding upon him alone. The transaction was a discount for the accommodation of *Weyman*, and was not entered into for the benefit of the partnership. The signature of *Clough* as the indorser of the bills cannot be considered as the signature of the firm, without involving *Clough* in a direct violation of the instructions furnished to him upon his going to America, because they state expressly that "it is understood that our names are not to appear on either bills or notes for the accommodation of others, and that they should appear as little as possible on paper at all, and then only as regards direct transactions with the house here." The authority of one partner to bind the firm must depend upon the powers given him by the articles of partnership, and cannot be exercised beyond those powers, or in violation of them. *Clough*, therefore, had no authority to bind his partners in this transaction, because the bills were for the accommodation of others, and did not regard a direct transaction with the house in England. The effect of such a mode of dealing might have been to render the firm of *Crowder Clough* and Co. liable upon two sets of bills in respect of one transaction, first upon the bills now in question, and secondly

(*a*) 3 Campb. 493.

upon those drawn upon *Crowder Clough* and Co., which, but for their failure, they would have accepted.

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The case was argued in the course of last term, when the Court took time for consideration; judgment was now delivered by

Lord TENTERDEN, C. J., who after recapitulating the facts of the case, thus proceeded. Upon this state of facts it was contended that the partnership of *Crowder Clough* and Co., were to be held liable as indorsers of the bills, in other words, that the indorsement of *Clough* was to be considered as the indorsement of that partnership, of which he was a member, and, looking at all the circumstances of the case, we are of opinion that *Clough's* name must be considered as the name of the firm for the purposes of business in America. That being so, the bankrupts were jointly liable with *Clough* as indorsers of the bills, and a verdict must be entered for the plaintiffs for the amount agreed upon at the trial. Postea to the plaintiffs.

CHARLES BAGSTER, *ex parte*.

A party committed for not answering satisfactorily before commissioners of bankrupt, may have a *habeas corpus* to bring him before the commissioners for further examination, but cannot throw the expense of bringing him up on the estate by a *mandamus*.

PLATT moved for a *mandamus* to be directed to commissioners under a commission of bankrupt issued against *William Bagster*, commanding them to examine *Charles Bagster*. It appeared by the affidavits, that upon an examination touching the bankrupt's affairs, *Charles Bagster* had been committed (*a*) for not answering satisfactorily; but that he had afterwards informed the commissioners that he was prepared to make further answers.

Lord TENTERDEN, C. J.—Why is the estate to bear the expense of bringing this person up? He was committed in consequence of his own default, and must bear the expense of a *habeas corpus* when he chuses to be examined again. Rule refused.

(*a*) *Ante*, vol. i. 572.

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The KING v. The COMMISSIONERS of SEWERS for the Levels of PAGHAM, &c. in the County of Sussex.

Persons occupying lands adjoining the sea may erect such defences as are necessary for the preservation of their own lands, although such erections may render it necessary for their neighbours to do the like.

So Commissioners of Sewers for the preservation of lands within the level.

Nor does any obligation arise to erect works for the protection of such neighbours, or to indemnify them against loss.

BRODRICK obtained a rule nisi for a mandamus to the Commissioners of Sewers for the levels of Pagham and certain other places in the county of Sussex, to issue a precept to the Sheriff of Sussex to summon a jury, to inquire what hurt, loss or disadvantage had been sustained by one *Wm. Cozens* by reason of certain groynes and other works, erected and made by the said Commissioners, and of assessing the compensation to be paid to the said *W. C.* for the same, *or* (*a*) to erect and make such other works as should be necessary and sufficient to prevent further injury being done to the premises of the said *W. C.* by reason of the said groynes, &c. The affidavits on which this rule was obtained stated that *W. C.* was owner of lands on the sea shore, abutting towards the west, on the levels of Pagham: that, about thirty years ago, *W. C.* erected a mill 100 yards from high water mark; about which time the Commissioners altered the groynes, &c. before erected to protect the levels against the sea, by taking away several small groynes, and erecting one large groyne at the eastern-most point of the lands adjoining *W. C.*'s land; that the effect of this groyne was to cause the sea to flow with increased force against *W. C.*'s land, in consequence whereof the land of *W. C.* had been gradually washed away until high water mark was within fifteen yards of his mill; that his property was reduced in value thereby, and that he had made application to the Commissioners for compensation and protection without effect.

The affidavit against the rule stated that no part of the coast could be secure unless groynes or other works were erected for its protection: that the groyne adjoining the lands of *W. C.* was essential to the safety of the levels;

(*a*) This alternative was suggested by one of the learned judges, on the application for the rule nisi.

that before it was erected the Commissioners had endeavoured to ascertain the best position and shape, and had made it merely with a view to the protection of the levels, and that the effect of every groyne was to make the water flow with greater force against the land to the eastward, and that if *W. C.* erected proper groynes his property would not be injured.

Gurney, Thesiger and *Capron* shewed cause. The only authority on the subject is a marginal note in *Callis*, 104 (*a*), by which it appears that the commissioners have no power to order a new wall to be made where there was none before. No bad intention is imputed to the Commissioners: it was their duty to protect the whole level. The loss arises from *W. C.* not giving his land the same protection. The Commissioners had no jurisdiction and no authority to do the acts which it is now attempted to compel them to do; and *W. C.* would have had an action against the Commissioners if they had ventured to build on his land, his land not being within the limits of their commission. The relator does not furnish the Court with sufficient information to enable them to guide their discretion. Unless the Commissioners have transgressed, this Court cannot interfere. There is nothing in the affidavits to shew what the defect in the groyne is. [Lord *Tenterden*, C. J. I do not understand that the Court are called upon to say what is to be done. *Bayley*, J. If they were to return that every thing necessary had been done, an action would be brought for a false return.] *Callis* says (*b*), "In my opinion, by the very true intent and meaning of the said statute, and by a just, equal and reasonable construction, it should lie in the power of the Commissioners of Sewers, upon just and urgent occasions and considerations, to make orders and decrees for erecting and making of new banks, new walls, goals, streams, sluices, and other

(*a*) Citing Style, 192.

(*b*) Page 103, (127,) of the 4th edition.

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necessary defences against the overflow of the sea; for *ubi nova fit maris incursio ibi novum est apponendum remedium*, with this caution, that under the pretence of the commonweal a private man's welfare be not intended to the charge, trouble, and burthen of the country." The object here is to assess. The jury summoned have never gone beyond assessing parties within the level. *Callis*, 104. 219 (*a*). If not within the level, the Commissioners cannot come; if within, then this is not the case put by *Callis*. *W. C.* must relieve himself by repairing his defences. But if the commissioners have done wrong, the relator has another remedy, and therefore he is not entitled to a mandamus. *Jones* v. *Bird* (*b*). Suppose a groyne erected by an individual, *W. C.* would have his remedy. Though the ground were lost by stealth, he might maintain an action. So here an action would lie against the Commissioners, and the Court will not interfere.

Brodrick, contrà. The Commissioners erected the works for the benefit of the level, and have done an injury to the party, for which it is said there is no remedy. The first point to be established is, that the party has sustained an injury: he is relieved from the difficulty under which he first made the application by the suggestion of one of the Court to take the rule in the alternative. [*Bayley*, J. Are there any parts of your affidavit which state that the wall was improperly built?] On the other side, the jurisdiction of the Commissioners, with respect to the act required of them, is denied. Wherever the Commissioners of Sewers have come, they have done what was necessary. In the case of *Cardiff Bridge* (*c*) the Court said that Commissioners of Sewers are subject to the discretionary power of the Court of King's Bench. Then can the Court do what is prayed by the second part of the rule? There may be a difficulty with regard to the first part of the rule; but there can be no objection to the alternative

(*a*) Pages 126 & 260 of the 4th ed.
(*b*) 5 B. & A. 837.
(*c*) 1 Salk. 146.

suggested by the Court. In *The King* v. *The Severn Railway Company* (*a*), a mandamus issued requiring the Company to restore a railroad which had been taken up. The Court there said, that the remedy by indictment only punishes for past acts, and is therefore not efficacious. [Lord *Tenterden*, C. J. There the party had no other remedy. *Bayley*, J. In that case they were bound to lay down, and continue.] If the party had brought an action against the Commissioners, it would have been a sufficient answer that they did the act complained of by virtue of the commission. In *The King* v. *The Vice-Chancellor of Cambridge*, *Wilmot*, J., said, if there is a clear right, the Court ought to find out a suitable and adequate remedy, and even to make a precedent if they cannot find one; for where there is a right, law and justice require that there should be some remedy or other. Under 23 *H.* 8th, the commissioners might have afforded a remedy. The Commissioners ought to summon a jury to ascertain who are to bear the expense of works which the Commissioners, in their discretion, think proper to erect. Part of the expense to be assessed is the cost of the new works, if it should be necessary to make a cut across. [*Bayley*, J. It must be presumed that the party has a licence from the owner of the adjoining land, supposing the works to be erected to the best of their judgment.] *Keighley's* case (*b*), *Callis*, 127. The land of *W. C.* not being within the limits of the commission, he could not apply to the Commissioners, and was therefore compelled to come here. The question is in reality reduced to this, who is to bear the expense? The last part of the rule is particularly relied on. *The King* v. *The Severn Railway Company* (*c*).

Lord TENTERDEN, C. J.—I am of opinion that this rule must be discharged. When the motion was made we entertained very great doubts whether the object of the rule

(*a*) 2 B. & A. 646.
(*b*) 10 Co. Rep. 139
(*c*) 2 B. & A. 646.

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could be obtained. Mr. *Brodrick* says, that the question is reduced to this point, who is to bear the expense? I think he is quite right. It is not contended that the Commissioners did not exercise a reasonable discretion, and we cannot say that they did not exercise the best discretion to obtain the object with the least possible injury. What has been done is by way of experiment. It may be conceded that the effect of the alteration is to injure *W. Cozens*'s land, and it is said that the Commissioners are bound to make the damage good. I cannot see that the Commissioners are differently situated from an owner of land. Then is there any authority to say that a party may not protect himself against the common enemy by erecting a groyne, which may render it necessary for his neighbour to erect a similar defence? If we were to direct the erection of this groyne for the security of *W. Cozens*, the owner of the next land might apply, and so on as far as the North Foreland. It is competent to an individual owner or to Commissioners to erect reasonable defences for themselves, leaving it to others to act as they think proper.

BAYLEY, J.—I am of the same opinion. The defence which in these cases is considered the best, is the making of groynes, a sort of sea-wall which collects the shingle. But for that defence the sea would overflow the level of the ground, and undermine the works. By these groynes the water is thrown to the eastward. If the Commissioners had acted with a malevolent view of injuring *W. Cozens*, they might have been punished by criminal information or indictment; but if they act honestly and *bonâ fide*, they are warranted in doing that which in their opinion is proper to be done for the protection of the level. They stand in the same situation as an individual owner of land. There are groynes along the coast where there are no Commissioners of Sewers; each land-owner is to take care of himself. The question is, who is to bear the expense? It is said that *W. Cozens* has sustained damage, and is entitled to a

remedy; but he is bound to make out that the act is wrongful. It has been urged, that where there is a right there is a remedy; but what is the right? Each party has a right to protect his own land. When *W. Cozens* has erected his defence, perhaps his neighbours will be obliged to erect one likewise. There being no malevolent motive, so as to subject the Commissioners to a criminal proceeding, I cannot say that they are guilty of a wrongful act; and if not, this party is not entitled to compensation.

HOLROYD, J.—I am of opinion that *W. Cozens* is not entitled to compensation.

LITTLEDALE, J.—I am entirely of the same opinion upon the first part of the rule. The Commissioners have no power under the commission to summon a jury for this purpose. It is said that the Court has a control over the Commissioners, and ought here to make them do their duty. This Court cannot order them to do any thing out of the scope of their duty. Upon the second point it appears to me that the Court ought not to award a *mandamus*. *Primâ facie* each party ought to do those acts which are necessary to secure his own lands. Some individuals might not be able or willing to make proper defences, therefore the statute of Sewers provides a mode of securing this object. The Commissioners are directed to superintend the whole line of coast. If they were compelled to do what is now asked, it might leave the coast open to great inconvenience. The Commissioners might be prevented by storms from obeying the *mandamus*. It is suggested that it might be sent to a jury to try whether what was done by the Commissioners was proper to be done; but Commissioners ought not to be subjected to the opinion of a jury as to their mode of proceeding; a jury could only form an opinion from the testimony of others. If the Commissioners act improperly within their jurisdiction, their acts are open to the remedies given by law. If they act without their jurisdiction, they are liable to an action.

Rule discharged.

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The KING *v.* The INHABITANTS of HIPSWELL (*a*).

An indenture by which a boy under eight years of age is bound apprentice to a chimney-sweeper, is absolutely void, by 28 *Geo.* 3, c. 48, s. 4; and service under it will not confer a settlement.

BY an order of two justices *Elizabeth Miller*, widow, and her four children, were removed from the township of Morpeth, in the county of Northumberland, to the township of Hipswell, in the parish of Catterick, in the county of York. On appeal, the sessions confirmed the order, subject to the opinion of this Court, upon the following case.

The pauper's husband, *Joseph Miller*, the son of *Jane Salkeld*, the wife of *Thomas Salkeld*, was, *at the age of five years*, bound by the said *Thomas Salkeld*, by the name of *Joseph Salkeld*, an apprentice to *William Wright*, a chimney-sweeper, under the following indenture:—"This indenture, made the 21st day of May, in the 44th year of the reign, &c., between *Thomas Salkeld*, of Alston Moor, in the county of Cumberland, yeoman, and *Joseph Salkeld*, his son, of the one part, and *Wm. Wright*, of the township of Hipswell, chimney-sweeper, of the other part, witnesseth, that the said *Joseph Salkeld* hath of his own free will, and with the consent of his said father, put and bound himself apprentice to and with the said *William Wright*, and with him, after the manner of an apprentice, to dwell, remain and serve from the day of the date hereof, for, during and until the term of seven years thence next following be fully completed and ended; during all which term the said apprentice his said master well and faithfully shall serve, his secrets shall keep," &c., in the usual form. "And the said *William Wright*, the master, in consideration of such service so to be done and performed, doth for himself, his executors, &c., covenant, promise, and grant by these presents, to and with the said *Joseph Salkeld*, the apprentice, that he the said *William Wright*, his executors, &c., shall and will teach, learn, and inform him, the said apprentice, or cause him to be taught, learned, and informed in the art, trade, or mystery of a chimney-

(*a*) This and the following cases were decided at the Sittings after Trinity Term.

sweeper, which the said master now useth, after the best manner of knowledge that he or they may or can, with all circumstances thereunto belonging. And also shall find and provide to and for the said apprentice sufficient and enough of meat, drink, washing, lodging, and clothes, fit and convenient for such an apprentice. In the case of the master's death within the said term, the apprentice is to be at liberty, and chuse a master for himself. And for the true performance of all and singular the covenants and agreements aforesaid, each of the parties aforesaid doth bind himself unto the other firmly by these presents. In witness whereof the parties above named to these present indentures interchangeably have set their hands and seals the day and year above written." The pauper's husband, *Joseph Miller*, so bound by the said indenture under the name of *Joseph Salkeld*, served under it as an apprentice to the said *William Wright*, during the time specified in the said indenture, in the township of Hipswell, where he resided during the same period. And the court of quarter sessions were of opinion, that he thereby gained a settlement in that township.

Patteson, in support of the order of sessions. The question is, whether the indenture in this case is rendered void by the statute 28 *Geo.* 3, c. 48. Now this is not a parish binding, and the first section of the statute clearly applies to parish bindings only. It gives a form of indenture, and enacts, that compulsory bindings in that form shall be of equal validity with voluntary bindings by the parties themselves. The second and third sections refer to the bindings mentioned in the first. [*Bayley*, J. The form of indenture given in the schedule would apply to bindings by parents as well as by parish officers.] Doubtless it would, but still it does not affect the operation of the first section. Then the fourth section will probably be mainly relied on by the other side. That enacts, " that all indentures, covenants, promises, and bargains, hereafter to

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be made or taken, of or for the having, taking, employing, retaining, or keeping, of any boy or boys, as or in the nature of an apprentice or apprentices, or servant or servants employed in the capacity of a climbing-boy or chimney-sweeper, who shall be under the age of eight years as aforesaid, *than is* by this act limited, ordained, and appointed, shall be absolutely void in law to all intents and purposes.". That, read as it is printed, is wholly unintelligible. Probably the word "otherwise" was meant to have been inserted before the word *than*, but still this section must be construed with reference to the first, which applies to parish bindings only, for various other sections contemplate other bindings as valid, besides those specified. It must be admitted, that the title of the act, "An Act for the better Regulation of Chimney-Sweepers and their Apprentices," is general in its terms, and that some of the sections apply to all apprentices to chimney-sweepers; as the sixth, which speaks of voluntary bindings, and gives a power to justices to hear and determine complaints between masters and their apprentices in all cases. If the binding in this case be not within the statute, it is no objection that the apprentice was only five years old at the time of the binding. The right of an infant to bind himself an apprentice, has never yet been limited to any particular age. There is no direct authority upon the subject, though in Bro. Abr. Laborers, pl. 46, (*a*) it seems to have been considered that children *under* five years of age could not properly be employed as servants, which involves the inference that *at* that age they might. *Hall* v. *Hollander* (*b*) shews, that in an action by a master for an injury done to his servant, *per quod servitium amisit*, the *age* of the servant is immaterial, the gist of the action depending on his *capacity* to perform acts of service. By analogy, the criterion in a case like this would seem to be, not the age of the apprentice, but his capacity to perform the duties of an

(*a*) But see the case at large, H. 38 *H.* 6, fo. 22, pl. 4.

(*b*) 7 D. & R. 133; 4 B. & C. 660.

apprentice. No age is mentioned, either in the 43 *Eliz.* c. 2, for the binding of apprentices, or in the 8 & 9 *Will.* 3, c. 30, which gives the appeal, and compels the master to receive the apprentice. The 5 *Eliz.* c. 4, mentions ten years, but that relates to apprentices in *husbandry*, where greater strength may be required (*a*). In *Rex* v. *Saltren*, as reported by *Bott* (*b*), it is said, exception was taken, that the child was not of sufficient age to be bound apprentice, being only eight years old; but the Court thought it no objection: and in the same case, as reported by *Caldecott* (*c*), it is said, justices may appoint apprentices at any age beyond that of nurture, except, perhaps, in cases of husbandry. Secondly, even if the statute applies in this case, still the indenture is not absolutely void, but voidable only. The master may be liable to a penalty for violating the provisions of the statute, or the apprentice may, if he chuses, avoid the indenture; but the apprenticeship, and the service under it, when completed, may be good for the purpose of conferring a settlement; and that distinction was acted upon in *Rex* v. *St. Nicholas, Ipswich* (*d*). If an apprentice be bound to an infant, the indenture is not void, but only voidable; and unless there be some objection, the apprentice is entitled to the benefit of the apprenticeship; *Rex* v. *St. Petrox, Dartmouth*, (*e*); and the same, if he is bound to a master who has no right to take an apprentice. *Anonymous case* (*f*). In *Rex* v. *Stoke Damarel* (*g*), where the indenture was held absolutely void, the words of the statute applicable to that case were much stronger than those of the statute in question.

E. H. Alderson, contrà. The words "*or* otherwise"

(*a*) Lewin's Law of Settlement, 248.

(*b*) 1 Bott, 613.

(*c*) Cald. 444.

(*d*) Burr. *S. C.* 91.

(*e*) 4 T.R. 196. The apprentice in that case also was bound at the age of *eight* years.

(*f*) 2 Bott. 362; Lewin's Law of Settlement, 249.

(*g*) *Ante*, vol. i. 458; 7 B. & C. 563.

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have evidently been omitted by mistake in the fourth section, and their insertion will render it sensible and intelligible. The object of the statute was to prohibit *all* apprenticeships to chimney-sweepers under the age of eight years, and to regulate all above that age. A distinction has been made in argument between compulsory and voluntary bindings, but no such distinction is made in the act, at least with reference to the provisions respecting the age and treatment of the children. This indenture, therefore, is within the act. Being so, the indenture is not voidable only, but absolutely void. The intention of the legislature was to make a specific kind of bargain for individuals who were unable to make one for themselves, and to avoid absolutely every bargain not made in strict compliance with the provisions of the statute. It is said the indenture is voidable only, because the apprentice may avoid it, and he not having done so, a settlement ought to be gained. But how could a child of five years of age judge of the propriety of avoiding an indenture, or know what steps to take for that purpose? The statute says, that an indenture like this shall be "absolutely void in law to all intents and purposes," and it would be violating the spirit and defeating the object of the enactment, to hold that that means voidable only.

BAYLEY, J.—The title of the statute 28 *Geo.* 3, c. 48, is general, "For the better regulation of Chimney-sweepers and their Apprentices." The preamble states, "That the laws in being respecting masters and apprentices are not sufficient to prevent the complicated miseries to which boys employed in climbing and cleansing chimneys are liable." The first section empowers parish officers to bind under certain circumstances. The second section contains a regulation respecting parish indentures. The third section provides for a form of indenture which is general, and applies equally to bindings by parish officers and by parents. It is not, however, necessary for us to decide whether those

three clauses apply to all bindings, because the fourth and several other sections go beyond the former three, and plainly extend to all cases of bindings, whether by parish officers or parents, in short to every possible binding or contract of apprenticeship or service in this particular trade. The former branch of the fourth section enacts, that all indentures, &c. for binding any boy under eight years of age as an apprentice to a chimney-sweeper, "than is by this act limited," shall be void in law to all intents and purposes. "Than is by this act limited" are senseless words, but the object of the legislature is still apparent, namely, to render void every indenture by which a boy under eight years of age is bound apprentice to a chimney-sweeper. If the former part of the section left any doubt upon this subject, it would be removed by the latter part, the meaning of which cannot be misunderstood; for that enacts, "that every person who shall henceforth have, take, employ, retain, or keep any such boy or boys as or in the nature of an apprentice or apprentices, or servant employed in the capacity of a climbing-boy or chimney-sweeper as aforesaid, who shall be under the age of eight years as aforesaid, *contrary to the tenor and true meaning of this act*, and being convicted thereof, as hereinafter mentioned, shall forfeit and pay for every such apprentice or servant so by him or her had, taken, employed, retained, or kept, any sum not exceeding 10*l.*, nor less than 5*l.*" But it is said that *void* has been sometimes held to mean *voidable* only, and that it ought to be so construed in the present instance. Where the provision is introduced for the benefit of the parties only, such a construction has undoubtedly been admitted, and properly. But here it was introduced for public purposes, to protect those who were incapable of protecting themselves; it is for the interest of society that it should be strictly enforced; and to give an option in such a case, and hold that this indenture was voidable only, would let in the mischief which was meant to be prevented, and defeat the object of the legislature. It would be contrary

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to the spirit of this act of parliament to consider the indenture in this case as voidable only; the consequence is, that we must declare it to be absolutely void, and that no settlement has been acquired by service under it.

HOLROYD, J. was absent.

LITTLEDALE, J.—I am of the same opinion. The fourth section, as it stands, is certainly not very intelligible, nor can it be rendered so, without either inserting or rejecting some words. But by either of those means it may. By inserting the words "or otherwise," the sense is rendered complete; by rejecting the words "than is by this act limited, ordained, and appointed," the same result is produced: and the rejection of those words seems to me to give an effect to the subsequent enactment, and to the words "contrary to the tenor and true meaning of this act," therein, which is otherwise wanting. The fourth section, thus considered, seems to me most clearly to comprehend the present case, and I think this indenture was absolutely void, as not having been made according to its provisions. To say that it was only voidable, would be to violate the spirit of the enactment. The cases in which that construction has been adopted, cannot apply to an act of parliament which was passed for public purposes.

Order of Sessions quashed.

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A landlord being sued for repairs done upon his estate, it is agreed that the tenant shall advance the amount out of the rent, and that the landlord shall pay two-thirds of the defendant's costs. The costs not being paid, the action proceeds. This arrangement is not such an acknowledgment of the defendant's original liability as will entitle the plaintiff to a verdict; even supposing that it is not inadmissible in evidence as being in the nature of a compromise. Per *Holroyd*, J. and *Littledale*, J.; dubitante, *Bayley*, J.

ASSUMPSIT for goods sold and delivered, and work and labour, with the money counts. Plea, non assumpsit. At the trial before *Garrow*, B., at the last Spring Assizes for the county of Cambridge (*a*), it appeared that notice of trial had been given for the Summer Assizes, 1827. In July, 1827, shortly before the Commission day, the defendant applied to the plaintiff to settle the action. The plaintiff, the defendant, and one Jones, the defendant's tenant, went together to the office of Archer, an attorney, where it was agreed that upwards of 100*l.* was due to the plaintiff upon the balance of an account for buildings erected, and for work done by the plaintiff on the defendant's estate, occupied by Jones; that the latter should pay that sum to the plaintiff out of his rent, and that the defendant should pay two-thirds of the plaintiff's costs, as soon as they could be ascertained. Jones paid the 100*l.*, and an account of the costs was furnished to the defendant, who had not, however, paid any part of such costs; for the purpose of recovering which the record was now brought down for trial. The plaintiff had paid his attorney the full amount of his costs. The plaintiff called a witness to prove that the work had been ordered by the defendant; but in this he did not succeed. Upon this it was contended, on the part of the defendant, that the plaintiff had mistaken his course, and that instead of proceeding to try this cause, he should have brought an action upon the agreement for the recovery of the two-thirds of his costs. The learned Judge, however, was of opinion, that inasmuch as it appeared by the agreement at Archer's, that a contract had been made, and had not been performed, the plaintiff was entitled to a verdict with nominal damages; but leave was given to the defendant to move to enter a nonsuit (*b*). A rule

(*a*) Counsel for the plaintiff, *Storks*, Serjt. and *F. Kelly*; for the defendant, *Biggs Andrews*.

(*b*) On the following day the learned Judge expressed his regret at having given the defendant leave to move.

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having been obtained last term for a nonsuit, or a new trial,

Storks, Serjt. and *F. Kelly*, now shewed cause. The defendant has not only acknowledged the debt, but he has paid it by the hands of his tenant, who, as he was to reimburse himself by retaining so much out of the rent, was merely the landlord's agent. Then there is nothing to distinguish this from the ordinary course of proceeding for the costs where the debt has been paid after action brought, except that here the plaintiff relinquishes his right to one-third of the costs, but that is for the defendant's advantage. The defendant should have applied to the Court to stay proceedings on the payment of the two-thirds costs.

B. Andrews, contrà. An admission made upon a treaty for a compromise cannot be used for the purpose of establishing a debt. *Gregory* v. *Howard* (*a*). It might be more advantageous for the defendant to pay two-thirds of the costs then incurred, than to defend the action successfully. The learned Judge said, that without the agreement no liability on the part of the defendant had been shewn; nor was there any other evidence of the defendant's liability. This agreement was void by the Statute of Frauds (*b*); and

(*a*) 3 Esp. N. P. C. 113.

(*b*) The objection on the Statute of Frauds seems to proceed either on the supposition that *Jones* was undertaking for the debt of the defendant, or that the defendant was undertaking for the debt of *Jones*. In the former case, the answer to the objection seems to be, that *Jones* was not the "party charged" within the fourth section of the statute; in the latter case, the fact assumed would of itself be sufficient to defeat the present action, as the plaintiff could not recover in *indebitatus assumpsit* against the defendant in respect of any collateral liability which the latter might have incurred for the debt of *Jones*. *Mines* v. *Sculthorpe*, 2 Campb. 215; Plowd. 183; 1 Wms. Saund. 24. If an action had been brought on the agreement, and it had appeared at all doubtful whether the credit was originally given to the defendant or to *Jones*, that doubt would have been sufficient to support the consideration. *Longridge* v. *Dorville*, 5 B. & A. 117. And see *Walker* v. *Constable*, 2 Esp. N. P. C. 659. *S. C.* not *S. P.* 1 B. & P. 306.

if it were not, the plaintiff's remedy would be by action on the agreement.

BAYLEY, J.—The evidence is defective in establishing the original liability of the defendant. But the plaintiff rests upon the agreement made at Archer's. The terms were, that Jones should pay the balance due to the plaintiff out of his rent; he was to be the hand to pay; the whole was to be paid out of the rent. There was nothing to shew who the landlord was, except what can be collected from the conversation at Archer's. If there had been no dispute who the landlord was, the defendant would be the person out of whose pocket the payment would be ultimately made. But the defendant and Jones being the only parties who treat with the plaintiff, I think the terms of the arrangement shew that the defendant was the individual by whom the payment was to be ultimately made. The defendant bargains that he shall pay two-thirds of the costs only, and the plaintiff agrees to give up the other third. I look upon it as an undertaking by the defendant to pay the whole debt. An agreement to purchase peace only, without the recognition of a liability, ought not to have any influence or to produce any result. I have a difficulty in saying what the effect is where the party agrees to pay the whole debt, and merely abates part of the costs; whether that is such an agreement as comes within the rule. In the case cited there was no acknowledgment of the whole debt being due. I think it ought to have been left to the jury to say whether what passed at Archer's was an offer to purchase peace, or an admission of a general liability. This would only entitle the defendant to a new trial. But I believe my learned brothers are of a different opinion.

HOLROYD, J.—It seems to me that we are bound to enter a nonsuit. The learned Judge states that the plaintiff

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called his brother-in-law to prove the defendant's liability, but that the attempt entirely failed. It is contended by the plaintiff that he is entitled to recover damages on the evidence of the arrangement at Archer's; but that was an agreement entered into with a view to a compromise; and supposing it to be admissible in evidence, it does not shew a right to proceed upon the original cause of action, though it might be evidence to support a new ground of action, founded on the agreement (*a*). I think it doubtful whether the evidence was receivable at all.

LITTLEDALE, J.—Supposing the evidence to be admissible, it would have had considerable weight if it had stood alone; but inasmuch as the plaintiff attempted to shew the defendant's original liability, and failed in that attempt, it seems to me that there was an end of the case. If so, the evidence of what took place at Archer's did not set it up. All the parties who met there knew that the plaintiff had done the work, and ought to be paid. The work being done on the premises, would naturally benefit the estate. Independently of this being a negociation for a compromise, there was, therefore, a reason why the parties should enter into an arrangement, grounded on the property and interest of the defendant in the estate which had been benefited.

Rule absolute to enter a nonsuit.

(*a*) *Secus*, if the arrangement had necessarily implied an acknowledgment of a cause of action for goods sold and delivered, (for which the plaintiff originally sued.) *Kingston v. Phelps*, Peake, N.P.C. 228.

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DOE, on the several demises of CHARLES PRIDEAUX BRUNE and EDWARD COODE v. WILLIAM MARTYN the younger.

EJECTMENT, for lands in the parish of Padstow, in the county of Cornwall. Plea, not guilty, and issue thereon. At the trial before *Burrough* J., at the Cornwall Spring Assizes, 1825, the plaintiff obtained a verdict, subject to the opinion of this Court upon the following case.

By a marriage settlement Whiteacre is limited to *A.* for life; remainder to trustees during the life of *A.* to preserve contingent remainders; remainder to *B.* for life; remainder to the trustees during the life of *B.* to preserve, &c.; remainder to the sons of *B.* by *D.* successively in tail male; remainder to the right *heirs male* of *B.* for ever.

By indentures of lease and release, dated 5th and 6th November, 1722, the release being tripartite, and made between *William Martyn*, gent. and *Thomas Martyn*, gent. son and heir apparent of the said *William Martyn*, of the first part, *Jenefer Hooper*, widow, and *Martha Hooper* her daughter, of the second part, and *Lawrence Growden*, gent. and *John Hooper*, gent., of the third part, in consideration of a marriage then intended between the said *Thomas Martyn* and *Martha Hooper*, and of the marriage portion of *Martha Hooper*, and for securing to her a competent jointure, and for limiting the said hereditaments thereinafter

By the same deed Blackacre is limited to *B.* for life; remainder to trustees, during the life of *B.*, to preserve, &c.; remainder to *D.* for life, for raising out of the rents, &c., an annuity, and subject thereto to the sons of *B.* by *D.* successively in tail male; remainder to the trustees to the use of the issue female of *B.* by *D.*, for raising portions, and maintenance until 21; and after raising such sums, or in default of issue female, to the use of the right *heirs male* of *B.* for ever:

Held, first, that the words "heirs male" were words of *limitation*, and gave *B.* the ultimate remainder in fee; and that even if they were words of *purchase*, they created a remainder contingent during *B.*'s life, which upon his death vested in his heir, by whom it was devisable.

Secondly, that the trustees took at most a limited fee, determinable on the portions being raised, and that after twenty years' adverse possession as against them, their right must be presumed to have been satisfied or released.

B. died, leaving two sons, who died without issue, and the survivor of whom devised to his wife for life, remainder to the children of *E.* living at the time of his wife's death. At her death nine children of *E.* were living, two of whom, in her life-time, had levied fines *sur conusance de droit come ceo* of their shares to *G.* After her death, *H.*, a stranger, entered; and six weeks afterwards, while *H.* was in possession, all the children of *E.* conveyed by lease and release, and fine, to *G.*:—

Held, first, that the interests of the two who had levied fines, although contingent only, were not thereby extinguished, but passed to *G.* the conusee.

Secondly, that the conveyance by the children to *G.* was valid, without a previous entry by them.

And therefore, thirdly, that *G.* might recover in ejectment against *H.* for *all* the lands.

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mentioned; and in consideration of 10*s.*, *William Martyn* and *Thomas Martyn* did grant, bargain, sell, alien and enfeoff, remise, release, convey, assure and confirm unto the said *Lawrence Growden* and *John Hooper*, one field called Minnisses, in the village of Tretor, in Padstow, two fields called Sandry's fields, lying in the village and fields of Crugmere, in Padstow, and divers other fields, among which were some called the Varwell Closes in Crugmere, in Padstow, all which said premises were then in the possession of the said *William Martyn* and *Thomas Martyn*, or one of them. And the reversion &c., and all the estate &c., and all deeds &c., to hold unto *Lawrence Growden* and *John Hooper*, their heirs and assigns; as to Sandry's fields and Minnisses, to the use of the said *William Martyn* for life, remainder to the use of *Lawrence Growden* and *John Hooper*, and their heirs during the life of the said *William Martyn*, upon trust to preserve contingent remainders, with remainder to the use of the said *Thomas Martyn* for life, remainder to the use of the said trustees and their heirs during the life of the said *Thomas Martyn*, upon trust to preserve contingent remainders, with remainder to the use of the first, second, third, &c., and other sons of the said *Thomas Martyn* by the said *Martha Hooper* successively in tail male, with remainder to the use of the right heirs male of *Thomas Martyn* for ever. And as to all other of the said settled premises, to the use of *Thomas Martyn* for life, with remainder to the use of the trustees, their heirs and assigns, during the life of *Thomas Martyn*, in trust to preserve contingent remainders, with remainder to the use of *Martha Hooper*, for her life, for raising out of the rents and profits an annuity of 25*l.*, and subject thereto, to the use of the first, second, third, and other sons of *Thomas Martyn* by *Martha Hooper*, successively in tail male, with remainder for want of issue male by *Thomas Martyn* on the body of *Martha Hooper*, or if such issue male should die without issue male, and *Thomas Martyn* should have any daughter or daughters on the body of *Martha Hooper* lawfully begotten and living at

the time of his death; then that *Lawrence Growden* and *John Hooper*, their heirs and assigns, should stand and be seised of the said hereditaments to the use and behoof of the issue female of *Thomas Martyn* on the body of *Martha Hooper*, for raising and levying out of the rents, issues and profits thereof such sum and sums of money to pay and satisfy such portion and portions to and with such daughter and daughters at such time and times as are hereinafter mentioned, that is to say, if one daughter, the sum of 600*l.* and if two daughters, to each of them the sum of 400*l.*, and if more than two daughters, the sum of 800*l.*, to be equally divided between them at 21; but if it should happen that the said sums and sum aforesaid could not be advanced and raised by and out of the profits of the said hereditaments at the times of payment thereof as aforesaid, then, and notwithstanding the said premises should stand and be charged with the payment of the portion or portions aforesaid, when and as soon after as the same could be advanced and raised out of the rents, issues and profits thereof. And that until 21 the trustees and their heirs should, out of the rents, raise such maintenance of such daughter and daughters as to the said trustees, their heirs and assigns, should seem meet and convenient. Proviso, that if such daughters should marry without consent, or the said *Thomas Martyn* should by deed or will revoke the said portions, the same portions should go to such other persons as the said *Thomas Martyn* should direct. And from and after raising, levying, and paying of the sum and sums of money as aforesaid, to and for the maintenance and education and portion to, for, and with such daughter and daughters as aforesaid, or for default of issue female, to the use and behoof of the right heirs male of the said *Thomas Martyn* for ever, and so that all and singular the thereby granted and conveyed premises, with the appurtenances, should go, descend and be in the blood, name and family of *Thomas Martyn* and his heirs and assigns for ever.

William Martyn, one of the settlors, died in 1722, and *Thomas Martyn*, the other settlor, died in 1740, leaving

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issue two sons, *William*, his eldest son and heir, and *Hooper*. *William*, the eldest son, entered into the estates in question and died without issue in 1779, leaving *Hooper*, his brother and heir, and he, after the death of his brother *William*, entered into the premises and continued in possession of them till 1795, when he died, leaving no issue. The only other issue of *Thomas Martyn*, the settlor, were *Martha Martyn* and *Grace Martyn*. *Martha* died in 1793 unmarried, and without issue. *Grace* married *James Elliott*, who died in 1761, leaving the following issue:—First, *Thomas Elliott*; second, *Richard Elliott*, who married *Agnes Best*; third, *Martha Elliott*, who married *Parnall*. *Richard Elliott* had three children:—First, *W. M. Elliott*; second, *Agnes Elliott*, who married *Joseph Martyn*; third, *Grace Elliott*. *Martha Parnall* had several children:—First, *William Parnall*; second, *Andrew Parnall*; third, *John Parnall*; fourth, *Grace Parnall*, who married *Samuel Thomas*; fifth, *Edward Parnall*; sixth, *Mary Parnall*. On the 26th September, 1795, *Hooper Martyn* made his will in writing, duly executed according to the Statute of Frauds, bearing date the day and year last aforesaid, by which he devised all the premises in question to his wife *Peggy*, (afterwards, by her second marriage, called *Peggy Hoblyn*,) for life, with remainder to all and every the son and sons, daughter and daughters, of his nephew *Richard Elliott*, and of his niece *Martha Parnall*, who should be living at the time of the decease of his said wife, share and share alike, as tenants in common, and not as joint tenants, and to their heirs and assigns for ever. *Peggy Hoblyn* died on the 12th March, 1824, and at the time of her death the issue of *Richard Elliott* and *Martha Parnall* then alive and entitled, (if by law they might be so entitled,) were the several persons above named.

No evidence was given at the trial of the actual raising of the sums directed to be raised by the settlement of 1722, for the benefit of the female issue, and charged on part of the premises in question; but on the death of *Hooper Martyn*, his widow and devisee as aforesaid took possession of all the premises, and continued in the enjoyment of them

from that time without interruption, except as hereinafter mentioned.

For some time previously to Michaelmas, 1822, one *Hawker* had been tenant to Mr. and Mrs. *Hoblyn* of the closes called Minnisses and Sandry's fields, but his tenancy ended at that time; and shortly before he quitted possession, he was served with the following notice, signed by the defendant's father:—"Whereas I claim to be owner and proprietor of all those fields called Sander's or Sandry's fields, and Minnisses park, situate within the parish of Padstow, in the county of Cornwall, which you now occupy at an annual rent: now I do hereby give you notice, that I intend to institute legal proceedings for the recovery thereof; and further, that you are not to pay any rent which now is, or hereafter may accrue, due, for the same, to any person or persons whomsoever, without my knowledge and consent. Dated this third day of June, 1822."

Shortly after *Hawker* had quitted these premises, the defendant's father went to all the closes, claiming to enter as lawful heir, to take possession, and cut a turf in the several closes, but he did not keep or continue in possession. Mr. *Hoblyn* received the rent due at Michaelmas, 1822; he could not then get another tenant, but he afterwards let the premises to one *Retallick*. At Michaelmas, 1823, the defendant, with his father, went again to the several closes, and turned out the cattle then therein: and in April, 1824, they went again, and began to plough the fields, which was objected to on the part of Mr. *Brune*, but the defendant persisted, and has kept possession since that time. After Michaelmas, 1824, the defendant paid the reeve of the manor of Trevose one year's chief rent for Sandry's fields and the Varwells, parcel of the premises in question, due to the said manor.

By indentures of lease and release, bearing date 6th and 7th May, 1824, the children of *Richard Elliott* and *Martha Parnall*, living at the time of *Peggy Hoblyn's* death, (the husbands of the married female children being parties to

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the deeds,) conveyed their interest to the lessors of the plaintiff. These deeds recited several former conveyances, and, among others, deeds of lease and release (*a*), and a fine *sur conusance de droit*, &c., by *Joseph Martyn* and *Agnes* his wife, formerly *Agnes Elliott*, unto *Edward Coode* and his heirs, of Michaelmas term 48 *Geo.* 3; and lease and release, and a fine *sur conusance de droit come ceo*, by *Samuel Thomas* and *Grace* his wife, formerly *Grace Parnall*, to the said *Edward Coode*, of Trinity term, 54 *Geo.* 3.

In Trinity term, 1824, a fine was levied in pursuance of a warrant contained in the deed of May, 1824; and the third proclamation was in Hilary term, 1825.

The declaration contained two demises of the same date, namely, 1st September, 1824, the first by *Brune*, and the second by *Coode*, and the premises sought to be recovered were Minnisses, Sandry's fields, and the Varwell closes in Crugmere.

Preston, for the lessors of the plaintiff. Where a life estate is given to the ancestor, with a limitation of whatever kind to his heirs, the two estates unite. This may be premised upon the authority of the general rules of law, and of the rule in *Shelley*'s case (*b*). It follows, that the life estate given to *Thomas Martyn* by the settlement united (*c*) with the ultimate remainder to his right heirs male,

(*a*) As to which see *post*, 513 (*a*).

(*b*) 1 Co. Rep. 93.

(*c*) Where the limitation for life is followed by an *immediate* limitation to the heirs, the life estate by merging in, accelerates the remainder in fee, which the second limitation, operated upon by the rule in *Shelley*'s case, confers upon the ancestor. But in every case the *rule* has performed its office, by transferring to the ancestor the benefit of the limitation to his heirs; the consolidation of the life estate and remainder (where they do consolidate) resulting from other principles. There is, therefore, properly speaking, no *uniting* of the two limitations under the rule in *Shelley*'s case. And it should be observed, that the rule applies to cases where a uniting of the two limitations would be impossible; as where the estate given to the ancestor is *pur auter vie*, or *durante viduitate*, &c., and also where the second limitation is mediate, or even contingent; in all which several cases the nature or situation of the limitations ex-

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and became either an estate in tail or in fee to him and his male heirs. But there are no words of procreation, therefore it could not be an estate in tail; and to render it an estate in fee, the word *male* must be rejected, because no one can create a new rule of descent: and that being done, it was an estate in fee simple. Lord *Ossulston's* case (*a*), and *Dawes* v. *Ferrers* (*b*). Then, when *Hooper Martyn* made his will, he had a vested remainder in fee under the settlement; and the lessors of the plaintiff claim under his devisees. And this will apply with equal force to the whole of the property in question; because, although part of it was given to trustees and their heirs to the use of the female issue, that was only for particular purposes, which must be presumed to have been long since answered. The defendant, therefore, must rely exclusively upon the doctrine of estoppel, and contend that his entry upon the lands after the death of *Peggy Hoblyn*, had the effect of disseising the devisees of *Hooper Martyn*, and that the fine afterwards levied by them worked an estoppel, and had the effect of protecting him as disseisor. The fact of a disseisin, however, is not found by the case; and even assuming that the doctrine of estoppel will apply, the lessor of the plaintiff, *Coode*, will nevertheless be entitled to two ninth parts; because, as two of the nine devisees of *Hooper Martyn*, before the death of *Peggy Hoblyn*, conveyed their interest by lease and release, and fine *sur conusance de droit come ceo*, to the lessor of the plaintiff *Coode*, he has a title by estoppel to their two ninth parts, prior to any title by estoppel that can be set up by the defendant. *Helps* v. *Hereford* (*c*). But the doctrine of estoppel cannot apply at all, because the case does not find a disseisin by the defendant; therefore, in either point of view, the lessors of the plaintiff are entitled to recover.

cludes the notion of their coalescing. The rule, in fact, does not appear to found itself on any relation or affinity between the two limitations. The term "unite," though for these reasons apparently inaccurate, is, however, very commonly used with reference to the operation of the rule in *Shelley's* case.

(*a*) 3 Salk. 336; 11 Mod. 189.

(*b*) 2 P. Wms. 1.

(*c*) 2 B. & A. 242.

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Fraser, contrà. The words "heir male" in the ultimate remainder in the settlement are words of purchase and not of limitation, therefore the first position advanced on the other side fails. The general application of the rule in *Shelley's* case must be admitted; and it must be granted that those words must operate as words of limitation, *unless* there appear a clear intent (*a*) on the part of the settlor to use them as words of purchase. But where that intent is apparent, the rule does not apply, for as Mr. *Fearne* says, "some instances there are even in cases at common law wherein the subsequent limitation to the heirs of the body has been so qualified and corrected by other additional words, as to amount to words of purchase and not of limitation" (*b*). So, in *Walker* v. *Snowe* (*c*), and *Lisle* v. *Gray* (*d*), those words were held to be words of purchase (*e*), because the presumption was, that the parties

(*a*) In every case in which an express life estate is limited to the ancestor, it appears impossible to doubt that the *intention* of the settlor, in using the word "heirs," could not be to give the fee, contrary to his own declaration, to the ancestor.

(*b*) Fearne, Conting. Rem. 148, sixth ed.

(*c*) Palmer, 359.

(*d*) 2 Lev. 223.

(*e*) Rather words of "description" or "special designation." Much confusion has arisen from not adverting to the *threefold* use of the word "heirs," which sometimes merely measures the duration and marks the course of the estate of the grantee, in which case it is a word of "limitation;" secondly, as a word of purchase, it indicates the objects of the gift, whilst at the same time it measures the duration and marks the course of the estate; thirdly, in other cases it is explained by the context to be used in a sense entirely different from that which the law affixes to it, and to mean "son," "child," or some individual intended to be designated; it is then a word of "description" only. It is in the second sense that the word "heirs" is properly a word of "purchase," because it is then only that the party takes by purchase and *as heir*. The word "heirs" must be employed with the *intention* that it shall take effect as a word of purchase in the *second* sense, in order that it may become, by the operation of the rule in *Shelley's* case, a word of limitation in the *first* sense. Where the word is used in the *third* sense, the case is entirely without the rule. The confusion in the cases appears to have resulted from not distinguishing between the second and third modes of using the word "heirs." And see Hayes's Principles for expounding Dispositions of Real Estates, Elementary Essay, xxxvi.

had intended to use them in that sense. Such an intent is evident in this case. It has been conceded that these words here cannot create an estate tail, because the other requisite words, " of the body," are wanting, and that they cannot create an estate in fee, without rejecting the word " male." But upon what principle is the word " male" to be rejected here? No word ought to be rejected, if it be possible to assign to it a sensible meaning; and the words " heirs male" in this settlement, if construed as words of purchase, do bear a sensible meaning: and the subsequent words declaring that the premises " shall go, descend, and be in the blood, name and family of *Thomas Martyn* and his heirs and assigns for ever," shew clearly the intention to use words of purchase. Now, if so, the remainder was contingent at the time when *Hooper Martyn* made his will, and, as such, it could not be the subject of devise. [*Bayley*, J. Assuming that the words in this case are words of purchase, and supposing that there is no person to be found answering their description, what would be the consequence? Would not the effect be the same, as if there were no such words in the deed?] The remainder did not vest until the particular estate for life had ceased; and if there were then no person answering the description of the words, the estate descended to the heir of the settlor, *Thomas Elliott;* and there is no demise by him. [*Bayley*, J. Suppose an estate is devised to *A.* for life, remainder to *B.* in fee, if living at the time of *A.*'s death, and the testator dies; does any thing descend to his heir, or what becomes of the fee?] The fee would be in abeyance. [*Bayley*, J. It would not be in abeyance, according to the case of *Purefoy* v. *Rogers*(*a*), but would, in this case, be in *Hooper Martyn*, and he might devise it.] The question in that case arose upon a will, and not upon a conveyance by way of lease and release. But should this point be ruled against the defendant with respect to Minnisses and Sandry's fields, it still cannot affect the rest of the property, because that was limited to different uses.

(*a*) 2 Saund. 381.

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Those lands were settled upon trustees, for the purpose of raising portions, and in them the trustees took an estate in fee. The money for the portions was not to be raised until after *Hooper Martyn* died without male issue. That event took place in 1795. If the trustees took the fee, no estate could be limited after it, although it was determinable; and then the heirs of *Thomas Martyn* could have no legal interest, but an equitable interest only. The words are large enough to pass the fee. There is no definite period at which the estate is to cease, therefore the trustees took the fee. *Doe* v. *Willan* (*a*). It was uncertain when the money for the portions would be raised, and it is not found as a fact whether it ever has been raised; that was a question for the jury: the Court cannot form any presumption on the subject. *Doe* v. *Passingham* (*b*). The interests created by the will of *Hooper Martyn*, after the death of *Peggy Hoblyn*, were contingent: and though such an interest may perhaps be devised, *Doe* v. *Tomkinson* (*c*), it clearly cannot be assigned. *Lampet*'s case (*d*). Then the lease and release by *Agnes Elliott* and *Grace Thomas* conveyed no estate, and the fines gave no title, but, on the contrary, operated as an extinguishment of the contingent interests of those who were parties to them. *Buckler*'s case (*e*), *Weale* v. *Lower* (*f*). In the last mentioned case it was undoubtedly held that the fine operated as an estoppel, and not as an extinguishment; but that was a fine *sur concessit*, and these were fines *sur conusance de droit*, which operate only by way of extinguishment: a distinction which is expressly laid down in the fifth resolution. Lord *Talbot* says, in *Vick* v. *Edwards* (*g*), that a fine levied of a contingent interest will pass a good title by way of estoppel, and though he does not mention the species of fine, his reference to the case of *Weale* v. *Lower* (*h*) goes far to shew

(*a*) 2 B. & A. 84.
(*b*) 6 B. & C. 305.
(*c*) 2 M. & S. 165.
(*d*) 10 Co. Rep. 46, & note (D.)
(*e*) 2 Co. Rep. 56, 6th Resol.
(*f*) Pollexfen, 54.
(*g*) 3 P. Wms. 372.
(*h*) Pollexf. 54; *post*, 504, 5.

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that he must have been speaking of a fine *sur concessit*. The fourth resolution in that case seems to explain this point, for it is there said, "a fine was levied *sur concessit* for years; it did not displace the fee; and when that vested, it fed the estoppel, and then the estate by estoppel became an estate in interest, and was the same as if the contingency had happened before the fine was levied." *Helps* v. *Hereford* (*a*) is distinguishable from the present case. There the heir conveyed by fine while the fee simple was in the ancestor, and the fine could operate only by estoppel, because the heir had no interest to convey; it was like the common case of a deed between two parties, where the party professing to convey having no interest, the deed operates by estoppel. Here the parties to the fine had an interest which was descendible, or devisable, though not assignable. *Davies* v. *Bush* (*b*), and *Tyrrell* v. *Marsh* (*c*), are exceptions to the general rule, and merely decide that a fine will not operate to the extinguishment of a power, where it appears on the face of the deed to lead or declare the uses, that such was not the intention of the parties. [*Bayley*, J. It is quite clear that the parties in this case did not intend to extinguish their interests by levying the fines.] That is so, undoubtedly; but the same may be said of every case in which a fine has been held to operate as an extinguishment. Lastly, no entry was ever made by the devisees of *Hooper Martyn* after the death of *Peggy Hoblyn*, his widow; their interest, therefore, could not be conveyed, and there is no demise by them. [*Bayley*, J. If they could demise, might they not convey?] No; a right of entry may be demised in ejectment, but cannot be conveyed. *Goodright* v. *Forrester* (*d*). The defendant in this case was an intruder, if he was not a disseisor; and after intrusion, the party having the right of entry must actually enter before he can convey; Co. Litt. 49, a; where it is said, "If the feoffor be out of possession (not confining the position to the case of a *disseisin*) neither

(*a*) 2 B. & A. 242.
(*b*) M'Clel. & Y. 58.
(*c*) 3 Bingh. 31.
(*d*) 8 East, 552; 1 Taunt. 578. And see 1 Wms. Saund. 319 a; *Fenn* v. *Smart*, 12 East, 444.

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fine, recovery, indenture of bargain and sale inrolled, nor other conveyance, doth avoid an estate by wrong, and reduce clearly the estate of the feoffor and make a perfect tenant of the freehold, but only livery of seisin upon the land:" and *Butcher* v. *Butcher* (*a*) is a recent decision involving the same principle.

Preston, in reply. The first point made on the part of the defendant is fully answered by the decisions in Lord *Ossulston*'s case (*b*), and the case of *Counden* v. *Clerke* (*c*), the latter of which establishes that in order to construe the words "heirs male" as words of purchase, the party claiming to take under them must make himself out to be both "heir" *and* "male." These words cannot designate a special heir, except in the case of an estate tail, which the present clearly is not. With respect to the second point, whatever estate or interest remained undisposed of by the settlement was not in abeyance, but was a grantable or devisable interest which vested in the heir of *Thomas Martyn*, until it could vest according to the terms of the settlement: and it was devised by his heir, *Hooper Martyn*, under whose will the lessors of the plaintiff claim. Upon the third point, which relates to those parts of the property in which the female issue were interested, it is said, that the trustees took the fee. But the settlement contains no words which warrant that construction. The property is settled to the use of the female issue (*d*), and the legal estate was executed in them by the statute (*e*). For one particular purpose the trustees were to receive the rents; but that gave them only a chattel interest, *Jemmot* v. *Cooly* (*f*); and the purpose must be presumed to have been answered long

(*a*) *Ante*, i. 220; 7 B. & C. 399.
(*b*) 3 Salk. 336; 11 Mod. 189.
(*c*) Hob. 29.
(*d*) *Ante*, 487.
(*e*) Qu. whether the estate executed in the daughters was for more than a chattel interest, as upon a devise to executors until debts are paid? *Vide ante*, vol. i. 47.
(*f*) 1 Lev. 170.

ago. An estate to *A.* and his heirs, to hold until a certain contingency shall happen, is a common estate, but it is not a fee (*a*). Here the estate to the trustees was at all events to cease upon the female issue coming of age; therefore it could not, under any circumstances, become absolute: and therefore it was not a fee. But assuming that the trustees did take a fee, still the argument raised upon the principle that no estate can be limited after a fee, does not apply, because that principle does not extend to wills or conveyances to uses. Then as to the conveyance by the devisees of *Hooper Martyn*, there was no interest vested in any of those persons; their interest was a mere chance or possibility; they were mere strangers; such interest as they had could neither be granted, devised, nor released; *Leake* v. *Robinson* (*b*), *Ive* v. *Audley* (*c*); therefore it could only be bound by estoppel, and it was in that mode, and in that only, that the conveyance and fine by them could and did operate. As to the extinguishment of the contingent interest by the fine, *Davies* v. *Bush* (*d*) is a direct authority to shew that the fine could not so operate. The case of disseisin put in *Buckler's* case (*e*) is very distinct from the present, for there the disseisor had the seisin, and the disseisor had only the right; and the law does not permit a right to be tranferred: besides, even that case was denied in *March*, 66. As to the resolution cited from *Weale* v. *Lower* (*f*), that was the case of a contingent remainder to a party ascertained, and was moreover an *obiter dictum*, not necessary to the decision of the question there before the Court. Lastly, there was no necessity for an entry by the devisees of *Hooper Martyn*. The defendant is not a disseisor; there is no disseisin here; *William* d. *Hughes* v. *Thomas* (*g*); and if there is no disseisin, there is no intrusion, for the one cannot be without the other: here

(*a*) Such an estate appears to be a fee simple determinable.
(*b*) 2 Meriv. 363.
(*c*) 1 Cox, 324.
(*d*) M'Clel. & Y. 58.
(*e*) 2 Co. Rep. 56, 6th Resol.
(*f*) Pollexfen, 54, 4th Resol.
(*g*) 12 East, 141.

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there is nothing but a naked possession by a trespasser, which cannot bar the real owner's right to convey. But even supposing an entry was necessary, still the lessors of the plaintiff had a previous title to two ninth parts by estoppel, and for so much, at all events, they are entitled to retain the verdict.

The case was argued at the sittings in Banc after last Easter term, when the Court took time for deliberation. Judgment was now delivered by

Bayley, J., who, after stating the facts of the case, thus proceeded. Upon this state of facts, the first question which was discussed was, what was the effect of the limitation to the use of the right heirs male of *Thomas Martyn*? Whether these words were words of limitation, or whether they were words of purchase? It was properly conceded by Mr. *Fraser* that they were to be taken, not as words of purchase, but as words of limitation, unless a contrary intention were manifest; but he insisted, that from the whole scope of the deed a contrary intention was manifest, and that the limitation pointed to such person as should be heir male of *Thomas Martyn* at the time the preceding estates should fail. Now for such an intention I have looked in vain throughout the whole of this deed. If in this case I were at liberty to conjecture, the opinion I should form would be, not that the testator was looking to any particular individual, or meant to make the object of his bounty any person who at a distant and indefinite time might fill the character of heir male; but that he meant to create a general estate in tail male in himself, and that, either by accident or otherwise, he unintentionally omitted the words necessary to shew of whose body they were to be heirs male. The consequence of this would be, that these would be words of limitation, that the word "male" must be rejected, and that under these words *Thomas Martyn* took immediately the ultimate remainder in fee. But suppose these to be words of purchase, it would not bar, as

it seems to me, the lessors of the plaintiff, because, upon the execution of the deed, this would be a contingent remainder, on the ground that *nemo est hæres viventis*, and that during the life of *Thomas Martyn* no one could be either his heir or heir male. But I can see no reason why it should not vest the instant *Thomas Martyn* died, the instant there came into being a person who satisfied the character of his heir male. The law inclines to the vesting of estates; and as soon as a person comes *in esse* who fills the character to which a particular remainder points, that remainder vests, unless there be something to shew an intention that it should not then vest. Is there any thing to shew such an intention here? I think not. The limitation is not specially to the *then* right heirs male of *Thomas Martyn*, or to such persons as shall *then* be such heirs male, but generally to the right heirs male of *Thomas Martyn*. As soon, therefore, as any person filled that character and answered that description, that remainder vested in interest. Upon the death of *Thomas Martyn* in 1740, the remainder vested in *William*, who was then his heir, and upon the death of *William* in 1779, the remainder descended in fee on *Hooper*, who had therefore power to make a will.

The next question applies, not to the whole estate, but to that property only which is included in the second branch of the settlement, namely, the Varwell closes, and the property in Crugmere. This question is, whether the limitation to the trustees to the use of the issue female of *Thomas Martyn*, vests the whole fee in the trustees, so as to prevent the persons who claim under the ultimate remainder from having any claim at law. The limitation is, that for want of issue male of *Thomas Martyn* by *Martha Hooper*, or if such issue should die without issue male, and *Thomas Martyn* should have a daughter or daughters by *Martha Hooper*, living at his death, then the trustees, their heirs and assigns, should stand seised to the use and behoof of the issue female of *Thomas Martyn* by *Martha Hooper*, for raising out of the rents, issues, and profits of the estate,

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600*l.* if there was only one daughter, and 800*l.* if there were more, to be paid to them at 21; and if such sum could not be raised out of the profits by the time of payment, then the premises should stand charged with those sums, until they could be raised out of the rents, issues, and profits. Until 21, that is, until the daughters had attained 21, the trustees and their heirs were to raise such maintenance for the daughters as they should think fit. The trustees, therefore, have no express power given them over the rents, except during the infancy of the daughters; and upon the daughters attaining 21, the use seems executed in the daughters, and it is to them, and to them only, that the control appears to be given over the rents, issues, and profits. Suppose, however, that the legal estate had been vested in the trustees, and that the 600*l.* or the 800*l.*, in the events which happened, were to have been raised, and that the trustees were the persons who ought to have raised them, and that they took a fee, it is impossible to say that they took more than a limited fee, a fee which must have determined when the 600*l.* or the 800*l.* should have been raised, and the ulterior right expectant upon the determination of that limited fee must at law have been in the heir at law of the settlor, not by way of limiting a fee upon a fee, but because it was part of the old right; and upon failure of the estates which were limited by the settlement it returned back to the settlor. The doctrine applicable to this part of the subject is to be collected in Co. Litt. 191 a. n. 1. Considering, then, that no claim ever appears to have been made by the trustees, that nearly 20 years of a possession adverse to their claim had occurred at the time this ejectment was brought, and that much more than the full term of 20 years' adverse possession has been since completed, (for the defendant's possession not being shewn to be under them, or on their behalf, must be taken to be adverse to their claim,) and that up to the present time they appear to have made no claim, we think the defendant cannot avail himself of any supposed

right in the trustees. The presumption at this distance of time is, that it was either released or satisfied; and we think it too doubtful and too distant to be a defence in the mouth of a stranger.

The next point was, whether the conveyance of the 6th and 7th of May, 1824, passed any interest to the lessors of the plaintiff; and upon that we entertain no doubt. The objection was, that the remainder-men, the grantors, had not entered at the time the deeds were executed, and that the defendant had. It was admitted that, generally speaking, an entry by a remainder-man was not necessary; but it was contended that this was not to be treated as an ordinary case, because the defendant had entered. There is, however, no authority for holding such a conveyance inoperative.

In Co. Litt. 49 a. (*a*) it is said, "if the feoffor be out of possession, a fine, recovery, indenture of bargain and sale inrolled, or other conveyance, does not avoid an estate by wrong." It does not say that the conveyance is void, but only that it does not avoid an estate by wrong. But what estate had the defendant in this case? The remainder-men were entitled to treat him as an intruder, for the sake of the remedy, but it does not lie in his mouth, as against them, to say that he had any estate. What are the facts? *Peggy Martyn*, the tenant for life, died on the 12th of March, 1824. Was any one then in possession. The case does not find the fact. Did any of the remainder-men, or did any person on their behalf, enter? The case is silent as to that fact. Some time in April, it is not stated when, the defendant entered, and began to plough the fields. That was objected to on the part of *Brune*, but not by the persons in whom the legal estate had vested. But did *Brune* know it? Did *Coode*, or any one of the remainder-men, know it? It is not stated that they did; and on the 7th of May the conveyance was executed. If the sale had been one of a *pretended* title only, the case would have been

(*a*) 2 Thom. Co. Litt. 353.

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within the operation of the statute 32 *H.* 8, c. 9. But to bring a case within that statute, the seller must have a *pretended* title only, and the information must aver that it *is* a *pretended* title only, for that is the point of the action. *Rex et Barnes* v. *Hill*(*a*). But here, there was a sale of a *valid*, not of a *pretended* title, where the possession had gone with the title till within two months of the sale, and there had been no act of dispossession, if there ever was any, till within a still shorter period. It was argued that the conduct of the defendant amounted to what the law considers an intrusion, and that he was in the land as an intruder at the date of the conveyance. But what does the law consider an intrusion (*b*)? Not a mere wrongful entry into possession, unless the rightful owner elects so to consider it, but a wrongful possession of the *freehold;* and what Lord *Ellenborough* lays down in *William* d. *Hughes* v. *Thomas* (*c*) as to disseisin, applies equally to intrusion, both equally ousting the right owner, not from the possession merely, but from the possession of the freehold. He there says, "disseisin was formerly a notorious act, when the disseisor put himself in the place of the disseisee as tenant of the freehold, and performed the acts of the freeholder, and appeared in that character in the Lord's Courts." But what acts of notoriety are there in this case on the part of the defendant, as claiming to put himself in the place of the rightful freeholder? At most he was only in possession six weeks, and under those circumstances it does not appear to us that there was such an estate by wrong acquired by him, as would prevent the remaindermen from making a valid conveyance.

The last objection applies to two shares only, namely, those of *Agnes Martyn* and *Grace Thomas*, and the ground of that objection is, that before the death of *Peggy Martyn*, and while their estates were contingent, they had levied fines *sur conusance de droit come ceo*, and that all right as to their shares was thereby effectually extinguished and destroyed. Those

(*a*) Cro. Car. 238. And see 1 Hawk. P. C. c. 86, s. 10; Dyer, 74, b, pl. 19.

(*b*) Vide *Butcher* v. *Butcher*, *ante*, i. 220.

(*c*) 12 East, 155; *post*, 507.

fines were not produced in evidence at the time of the trial, and they do not constitute any part of the special case; but they are stated in the deeds of the 6th and 7th of May, 1824, and being so stated, we are bound to assume that there were such fines; and if those fines had the effect supposed of destroying the contingent remainder, then these deeds are, as to two shares, bad on the face of them. The fines are described in the release, as stated in the case, not as fines *sur concessit*, which if for years only would not have had the effect of working any destruction or extinguishment, but the one as a fine *sur conuzance de droit*, and the other as a fine *sur conuzance de droit come ceo*. Upon the question as to the effect of such a fine upon a contingent remainder, the authorities and opinions of text writers are contradictory. Mr. *Preston*, in the first volume of his *Treatise on Conveyancing*, page 209, seems to consider that the fine has in all cases the effect of destroying the contingent remainder. Mr. *Sugden*, in his book on Uses, considers that it has no such effect, and there are some passages in *Fearne*, in the edition published by Mr. *Butler*, in which he also seems to consider that a fine will not destroy a contingent remainder. It is clear that a contingent remainder cannot be passed or transferred by a conveyance at law. But in equity it is clear that it may. In *Whitfield* v. *Fawcett* (*a*), on a marriage settlement, a rent was created to the use and intent that the heirs of the body of the wife and their heirs should receive such rent, and subject thereto the land was limited to the husband and his heirs. There were two sons of the marriage, and they, in the life of the father and mother, sold this rent to the plaintiff, without fine. The estate was the father's. Lord *Hardwicke* held that the sons had not an actual possibility at the time they sold; the rent might never arise, or if it did, the sons might not be heirs of the mother's body at her death. Nothing, therefore, passed by that conveyance in point of law, it being by deed, and not by fine, which, had it been levied of this rent, and they had survived their

(*a*) 1 Ves. sen. 391.

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mother, would have operated as against them by estoppel, binding them and their heirs. In *Wright* v. *Wright* (*a*), testator devised in fee to his two daughters, but that if either died unmarried, his son *Robert* should take the estate in fee, paying the other daughter 500*l*. Testator died. *Robert*, in consideration of natural love, conveyed the land, and all his claim and right therein, to his younger son *George*. *Robert* died. One daughter died unmarried. *Robert's* eldest son filed a bill, claiming the estate on paying the other daughter 500*l*. The question was, whether the conveyance to *George* was a bar to the claim of the elder son; and Lord *Hardwicke* held it was, for though the limitation to *Robert* was by way of executory devise, and therefore a possibility only, which the law will not permit to be granted, yet it may be disposed of in equity to a stranger, and the bill was dismissed with costs. But, although a contingent remainder cannot be conveyed at law, it may be extinguished; and the question here is whether a fine in fee of necessity extinguishes it. It may be conceded that a fine, if so intended, will have that effect, and, as far as this case is concerned, that such shall *primâ facie* be taken to have been the intention; but the question is, whether the fine will have that operation when a contrary intention is apparent. Mr. *Preston*, in his *Treatise on Conveyancing*, seems to think that it shall. I do not cite this book as an authority, though from the learning, research, experience and discrimination of the author, it is *extra judicially* entitled to great weight; but I refer to it because it states the doctrine concisely, and the reason of it, and gives a reference to all the authorities. The passage to which I refer is to be found in page 209, and is as follows: "A person who has merely a right of action or of entry, or a *contingent* remainder, *or other future or executory interest*, which does not give a vested estate, should cautiously avoid levying this species of fine, (that is, a fine *sur conusance de droit come ceo*,) unless he mean to *extinguish* his interest; for as rights of action, &c. (of course including contingent

(*a*) 1 Vez. sen. 411.

remainders) cannot be transferred, the conusee in the fine cannot derive any advantage from the fine. On the other hand, *strangers to the fine*, that is, persons not parties to it, may avail themselves of it, to preclude the title of the conusor, and a party will not be allowed, in opposition to his own fine, to assert a title to the land. The consequence is, that the fine enures to the benefit of the persons to whom the right might have been released, exactly the same as if the fine had been a release." The opinion here expressed by Mr. *Preston* is at variance with that of Mr. *Fearne*. In the *Essay on Contingent Remainders*, page 289, the latter says, "That a contingent estate cannot be passed or transferred by a conveyance at law, before the contingency happens, otherwise than by way of estoppel by fine (or recovery), appears by *Weale* v. *Lower* (*a*), and *Vick* v. *Edwards* (*b*). In the 7th edition of that work by Mr. *Butler*, p. 366, this position is stated in a note, "[A contingent remainder may, before it vests, be passed by fine by way of estoppel, so as to bind the interest which shall afterwards accrue by the contingency,] but upon this head see Mr. *Preston's Treatise on Conveyancing*." The part within the brackets is in the text of *Fearne*, and it is introduced in the note as the legal position established by the section to which it applies. In the same edition, p. 366, it is said, that a contingent remainder cannot be passed or transferred by a conveyance at law, before the contingency happens, otherwise than by way of estoppel by fine or by recovery where the contingent remainder-man comes in by voucher, by *Weale* v. *Lower* (*c*), and *Vick* v. *Edwards* (*d*); but contingent estates it seems are assignable in equity. In the edition of *Gilbert on Uses*, by *Sugden*, p. 124, there is the following note by the editor: "It should seem that it may still be considered clear that a fine in fee of a contingent estate will operate to pass it to the conusee by estoppel."

(*a*) Pollexf. 54; *ante*, 494, 497; *infrà*, (*c*).

(*b*) 3 P. Wms. 372; *ante*, 494; *infrà*, (*d*).

(*c*) Pollexf. 54; *ante*, 494, 497; *suprà*, (*a*).

(*d*) 3 P. Wms. 372; *ante*, 494; *suprà*, (*b*).

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The opinions of text writers upon the subject being thus contradictory, it becomes necessary to examine the authorities upon which they respectively rely in support of those opinions. Mr. *Preston* relies upon *Weale* v. *Lower*, and upon what he calls the 6th resolution in *Buckler*'s case (*a*). The latter should rather be called an extra-judicial dictum; for it was not one of the points resolved, nor did it arise upon the facts in the case. It is this:—"Sixthly, it was said, if disseisee levy a fine to a stranger, that in this case the disseisor shall retain the land for ever; for the disseisee against his own fine cannot claim the land, and the conusee cannot enter; for the right which the conusor had cannot be transferred to him; but by the fine the right is extinct, whereof the disseisor shall take advantage." In *Weale* v. *Lower* the same doctrine is held by Lord *Hale;* but the case there in judgment did not fall within it. There a contingent remainder-man in tail, who had also the remainder in fee, levied a fine to the use of *I. S.* for five hundred years, and died before the contingency happened; upon his death the remainder in fee descended upon his heir, and whether *I. S.* had a right for the five hundred years against such heir was the question. That depended upon the point whether the fine destroyed the contingent remainder; and it was held that it did not, because the fine was for years only; but *Hale*, C. J. said, had the fine been levied in fee, it would have *destroyed the contingent use*, barred the heir, and enured and operated to the benefit of the possessor (*b*), as the fine of the disseisee to a stranger. Those authorities are relied on for the purpose of shewing that a fine in fee destroys the contingent remainder; but there are authorities the other way. *March*, 105, plac. 180, (Tri. 17 Car. 1.) is at variance with the dictum in *Buckler*'s case. The case is this:—"Disseisee levieth a fine: by *Reeve* and *Crawley*, it shall not give right to the disseisor, because this fine shall enure merely by way of estoppel, and estoppels bind only *privies* to them, and not a stranger, and therefore the disseisor shall

(*a*) 2 Co. Rep. 56. (*b*) Fearne, 366.

not take benefit of it, and therefore they did conceive 2 Rep. 56 a. to be no law. *Vide* 3 Rep. 90 a. and 6 Rep. 70 a." (*a*) In *Fitzherbert* v. *Fitzherbert* (*b*), "it was moved, if disseisee, not knowing of the disseisin, had levied a fine to a stranger, whether that should have barred his right, and enured to the benefit of the disseisor, according to 2 Co. *Buckler's* case (*c*), which if admitted would be of very mischievous consequence? But herein the Court delivered no opinion; but *Bramston*, C. J., and myself (*Croke*) conceived it should not enure to the benefit of the disseisor, but to the use of the conusor himself; for otherwise a disseisin being secret may be the cause of disinherison of any one who intends to levy a fine for his own benefit, for assurance of his lands upon his wife and children, or otherwise." The doctrine whether a fine by disseisee shall enure for the benefit of the disseisor is adverted to, and considered questionable, in Mr. *Hargrave's* note to *Co. Litt.* 49 a. n. 4, *Gouldsb.* 162; 1 *Roll. Abr.* Estoppel, (E.) pl. 3, and *William* d. *Hughes* v. *Thomas* (*d*). In note 320 to *Co. Litt.* 49 a. n. 4. *Buckler's* case is referred to, and it is said, "fine by disseisee extinguishes his right, and shall enure to the disseisor: but see this denied, M. 13 Car. B. R., *Crook.* n. 7, *Fitzherbert's* case, *Hal. MSS.*" (*e*) In *Gouldsborough*, 162, *Coke*; Attorney General, demanded this question of the Court:—"if there be disseisor and disseisee, and during the disseisin the disseisee, when he hath nothing but a right, levies a fine to a stranger, if by this fine the right of disseisee be gone, and if the disseisor shall take advantage thereof? *Popham* and *Gawdy*, Nay, truly." In 1 *Roll. Abr.* Estoppel, (E.) pl. 3, this is laid down:—"If disseisee suffer recovery to the use of *D.*, this shall be a good recovery by estoppel to bind disseisee and his heirs." If baron and feme be tenants in special tail, husband discontinues and dies, and the wife levy a fine without entering, the fine fortifies the discontinuance, and the wife cannot enter to be remitted, for the statute 32 *H.* 8,

(*a*) In *Edwards* v. *Rogers*, Sir W. Jones, 456, *Barkeley* and *Croke* were against, and *Jones* himself for, the estoppel. *Ib.* 462.

(*b*) Cro. Car. 484.

(*c*) 2 Co. Rep. 56.

(*d*) 12 East, 141.

(*e*) 2 Tho. Co. Litt. 354, n. 52.

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only avoids the discontinuance by the wife's entry, *Moore's* case (*a*). In *Wright* v. *Wright* (*b*), Lord *Hardwicke* lays it down that in law an heir may levy a fine in the life of his ancestor, which will bind by estoppel after descent to him. In the same case Lord *Hardwicke* says, "the reasons of the law's not allowing such a disposition which this Court (a Court of Equity) will, are mostly very refined," and in *Thomas* v. *Freeman* (*c*) Lord *Cowper* says, such notions would not have prevailed now. In *William* d. *Hughes* v. *Thomas* (*d*) a question was raised in argument whether a fine by disseisee should enure to the use of the disseisor; but the question was not decided, because the Court thought that there had been no disseisin; and Lord *Ellenborough* discusses the point, what is a disseisin, and what he says as to disseisin is equally applicable to a case of intrusion or abatement. The true principle seems to be laid down in *The Earl of Peterborough* v. *Bludworth* (*e*). There, in ejectment, before *Bridgman*, C. J., it appeared that disseisee levied a fine, and *declared the use by deed* to the conusee. *Bridgman* held this should not enure to the use of the disseisor; but if no use had been declared, it should have enured to the use of the disseisor, and should have extinguished the right of the disseisee, and he meant the jury to have found the facts specially, but they gave a verdict at large against his direction. And therefore his opinion at that period of time seems to have been, that if no use had been declared, the fine would have enured to the use of the disseisor, and extinguished the right of the disseisee; but that the use being declared, shewed the intent that it should not enure to the use of the disseisor. And this agrees with the decisions in *Vick* v. *Edwards*, and *Davis* v. *Bush*. In *Vick* v. *Edwards*, a case before Lord *Talbot*, there was a conveyance to the husband and wife, with what was considered a contingent remainder to the survivor of the husband and wife. Mr. *Fearne*, in his

(*a*) Palmer, 365; 2 Roll. Rep. 311.
(*b*) 1 Ves. sen. 412.
(*c*) 2 Vern. 563.
(*d*) 12 East, 155; *ante*, 501.
(*e*) 1 Lev. 128.

edition, doubts whether it was a contingent remainder, or whether the whole fee was not vested in the husband and wife, and the survivor of them; but Lord *Talbot* seems to have considered that the limitation to the survivor of the husband and wife was a limitation by way of contingency, and that it would vest in fee in the husband if he survived, or in the wife if she survived, but that until there was a survivorship it would continue a contingency; and in that case Lord *Talbot* was of opinion that a good title could be made to a purchaser by a fine by the husband and wife, and that it was not necessary that the heir at law of the ultimate owner of the estate, of the person from whom the estate moved, should join in that conveyance. Now the only principle on which Lord *Talbot* could have proceeded in that case was, (which is the principle on which it was meant to be decided,) that the fine by the husband and wife would operate by way of estoppel, and that when either the one or the other became the survivor, that party, whichever it might be, would be estopped, and by means of that estoppel the purchaser would have a good title to the estate. (*a*) Now that could not have been the case if the effect of a fine levied by the contingent remainder-man were to destroy the contingent remainder; for if that contingent remainder had been destroyed, the husband destroying his chance, and the wife her's, then, on the determination of the preceding estate, the heir at law of the person to whom the estate had come would have been entitled to have insisted on having that estate, because he would have been entitled to say, "you cannot claim under this conveyance; it passed nothing at the time when it was executed, and the contingent remainder being destroyed by this fine, when either

(*a*) The fine was necessary to create an estoppel as against the wife, whose execution of the deed of conveyance was a mere nullity; but if the husband had been the survivor, he would have been equally estopped by the indenture alone, (even where the conveyance is by lease and release, *Bensley* v. *Burdon*, 2 Sim. and Stuart, 519;) though estoppel *by fine* has been sometimes spoken of, as if estoppel could only arise by matter of record.

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of the parties became the survivor, their right was at an end, and the contingent remainder no longer being *in esse*, no right could enure either to them or to any person claiming under them." But the contrary was Lord *Talbot*'s opinion; for he thought that by estoppel a good title might be made to a purchaser, and that it was not at all necessary that the heir at law should join. In *Davis* v. *Bush* there was a limitation to the husband and wife, with a limitation also by way of contingent remainder to the survivor, exactly in the same way as in *Vick* v. *Edwards*. The husband and wife joined in mortgaging, and at the time of the mortgage they levied a fine, and that fine was declared to be to the use of the mortgagee. The mortgage was afterwards paid off; the husband became the survivor; he claimed the estate, and it was insisted that the fine had destroyed his contingency, his chance under the contingent remainder, and that he had no right whatever to have the estate. It was decided that the contingent remainder in the survivor was not destroyed by the fine, because it was controlled and limited by the deed to lead the uses, which shewed unequivocally that the parties only meant to give the mortgagee a security, and had no intention to affect any of the limitations in the original settlement; but that the fine, uncontrolled by the deed, would have destroyed them. These authorities shew that a fine in fee will not extinguish a contingent remainder, when a contrary intention is apparent. A contrary opinion must proceed on the doctrine of estoppel. Co. Litt. 352 a. shews that every estoppel must be "reciprocal, that is, to bind both parties, and that is the reason that, regularly, a stranger shall neither take advantage of, nor be bound by the estoppel; but privies in blood, as the heir, and privies in estate, as the feoffee, lessee, &c.; privies in law, as the lord by escheat, tenant by the curtesy, tenant in dower, the incumbent of a benefice, and others that come under by act in law, or in the *post*, shall be bound by and take advantage of estoppels:" and *Coke*, in his twenty-first reading on fines, says, "estoppel is reci-

procal on both sides; for he that shall not be concluded by a record or other matter of estoppel, shall not conclude another by it; and yet in our books the King estops the successor from saying that *M.* had nothing in the land, by reason that *M.* held of the King, and levied a fine to his predecessor *sur conusance de droit come ceo quil ad de son don;* and though the King were a stranger to it, and had nothing but this seigniory out of the land, yet the King took advantage of this estoppel. The reason for this seems to be the prerogative of the King (*a*), whereof I shall not speak; but otherwise it is in the case of a common person, as 22 *Ed.* 3, 17, and 40 *Ed.* 3, 30, are agreed. See 41 *Ed.* 3, by *Finchden* (*b*), that a stranger shall be concluded by a fine levied *sur' conusance de droit come ceo quil ad de son don.*" I think that must be a mistake, for I can find no case of the kind (*c*); and in 40 *Ed.* 3, 30, where it was argued that a fine should not bar, because the person against whom it was urged was a stranger to the person who levied the fine, *Finchden* says, "Certainly he may well counterplead against the fine, because he is not *privy to the fine;*" and at the end of the report is a note, "a stranger to a fine, or other matter of record, shall not be estopped." And in Bro. Abr. Estoppel, pl. 216, it is said, a stranger to a fine shall not plead it for estoppel (*d*).

(*a*) As to the King's prerogative with respect to estoppel, see Mann. Exch. Pract. 2d edit. 106, 122.

(*b*) William de Finchden was appointed one of the Justices of C. P. 29 Oct. 40 *E.* 3.

(*c*) Probably Lord *Coke* had in view the case of *scire facias* in T. 41 *E.* 3, fol. 3, pl. 4, in which *Finchden*, J., says, "In a writ of *formedon* in the descender, if the tenant plead *ne dona pas*, although the demandant would put forward a fine *sur render* proving the gift, the tenant shall not answer thereto, because it may be intended that no execution was ever had thereupon, and yet the fine is effectual. 24 *E.* 3, fo. 23. But in this case, if a writ of *formedon* be brought, I think that he shall not have such a plea, *because the fine in itself proves a gift, and a seisin in your ancestor.* Wherefore it seems to us that this *scire facias* does not lie." In this case the fine would appear to operate rather as *conclusive* evidence of title, than strictly by way of estoppel.

(*d*) Brooke says, "And so it was agreed, 36 *H.* 8, that a stranger to a fine or recovery shall not plead

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If the fines by *Agnes* and *Grace* destroyed their remainders, (it being uncertain, when those fines were levied, whether they would ever be entitled to any thing in this estate,) it must be upon technical grounds and reasoning only: let us see, therefore, whether technical grounds and reasoning, as well as sound sense and correct principles of law, do not lead to a contrary conclusion. Upon the death of *Peggy Hoblyn*, the only possible claimants would be *Thomas Elliott*, the heir at law of *Hooper Martyn*, or *Agnes* and *Grace*, or the persons claiming under their fines. The heir at law would be met by *Hooper Martyn*'s will, because that gives away the whole estate to the surviving children of *Elliott* and *Parnall*. He must then rely upon the fines of *Agnes* and *Grace*, and there he is met by this dilemma. Those fines either did operate, or they did not. They either passed the rights of *Agnes* and *Grace*, or they did not. If they did operate and pass the rights, the rights are in the persons claiming under the fines; if they did not operate and pass the rights, the rights remained in *Agnes* and *Grace*. From this dilemma the heir must attempt to extricate himself, by contending that *Agnes* and *Grace* are estopped from saying that their fines did not operate, and that nothing passed; but if they are estopped, he is estopped also, for estoppels are reciprocal. Then if he is estopped from saying that the fines did not pass the right to the conusees, the persons who claim under the fines are entitled as against him. But are *Agnes* and *Grace* estopped as against him? A fine bars by estoppel parties and privies, and parties and privies may take advantage of such estoppel; but can a stranger insist upon it? and the heir at law is a stranger to these fines. As against the parties claiming under the fines, *Agnes* and *Grace* may be estopped; but it does not follow that they are estopped as against

it for an estoppel; contrà, if he claim the same land under the fine or recovery by those who were parties; or if he claim *the same estate*, or part of it, and *that estate continues*, for then he is privy in the *per*."

strangers: and Co. Litt. 352 (*a*), is an authority for saying that they are not.

The heir at law, therefore, would, in our opinion, be barred by the subsisting right of *Agnes* and *Grace*, and would be unable to resist a claim made through them. Could a claim made through them upon *Peggy Hoblyn*'s death have been resisted by a stranger? According to the real state of the case, the *veritas facti*, the right would have been in them; their fines had not passed it from them (*b*). Had their claims been resisted by persons claiming under the fines, they might have been estopped *as against them;* but then their claim would have been defeated, not because the right had passed from them, but because they were estopped by their own fines, as against parties and privies to those fines, from saying that the right had not passed. The real bearing of the law upon the point seems to be this:—a fine by a contingent remainder-man passes nothing. It leaves the right where it found it. It is, therefore, no bar when the contingency happens, in the mouth of a stranger to the fine, to a claim in the name of the remainder-man. It operates by estoppel only, and parties and privies only can take advantage of the estoppel. Consequently, the lessors of the plaintiff are entitled to recover the two ninth shares of *Agnes* and *Grace*, as well as the other seven ninth shares of the estate.

Postea to the plaintiff (*c*).

(*a*) 3 Tho. Co. Litt. 430.

(*b*) It does not appear from the statement in the special case, (*ante*, 490,) whether the conveyances from *Martyn* and wife and *Thomas* and wife, to *Coode*, contained recitals disclosing the true state of the title. If they did, (and paucity of recital is not a common fault,) it would seem that no estoppel would arise. See *Hermitage* v. *Tomkyns*, 1 Lord Raym. 729; Co. Litt. 352, b. 8th point.

(*c*) And see *Palmer* v. *Ekins*, 2 Lord Raym. 1553; *Cholmondeley* v. *Clinton*, 2 Merivale, 173, 353; 2 Jac. and Walk. 1.

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ELSMORE v. The INHABITANTS of the HUNDRED of ST. BRIAVELLS, in the County of GLOUCESTER.

A building, never yet inhabited, constructed as, and intended for a dwelling-house, and used as a barn, is not "a house, outhouse, or barn," within 9 *Geo.* 1, c. 22, s. 7.

THIS was an action upon the statute 9 *Geo.* 1, c. 22, s. 7, brought by the plaintiff against the hundred of St. Briavells, in the county of Gloucester, to recover compensation in damages for the loss sustained by him, by reason of the wilful, malicious, and felonious setting fire to his "house, outhouse, and barn." Plea, not guilty, and issue thereon. At the trial before *Park*, J. at the Gloucestershire Spring Assizes, 1828, (*a*) the case was this:—The building of the plaintiff, which had been destroyed by fire, was near to his dwellinghouse, and in an unfinished state. It had been erected, and was originally intended to have been used as a dwellinghouse, but had never been inhabited. It contained five rooms, namely, a parlour and a kitchen on the ground floor, two rooms on the first floor, and one room on the second floor. It had a stone staircase, and all the window frames were fixed in, and one of them was glazed. For nearly two years it had been used as a barn, and straw and timber had been kept in it. At the time of the fire it contained straw, boards, and implements of husbandry. Upon this evidence it was contended on the part of the defendant, that the building was neither a "house, or barn," within the meaning of the statute; and, therefore, that the action was not maintainable. The learned Judge reserved the point, and the plaintiff obtained a verdict, with liberty for the defendant to move to enter a nonsuit.

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Russell, Serjt., in Easter term, obtained a rule *nisi* accordingly, against which

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Talfourd (*Campbell* was with him) now shewed cause. It must be admitted that the building in question was nei-

(*a*) Counsel for the plaintiff, *Campbell* and *Talfourd*; for the defendants, *Russell*, Serjt.

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ther a house nor an outhouse, within the meaning of the statute, because it was not a house or outhouse in respect of which burglary could have been committed; and the cases upon that subject certainly establish that a house built for the purpose of being used as a dwelling-house, but which has never in fact been used as such, is not a house in respect of which burglary can be committed. In *Rex* v. *Fuller* (*a*), the house had been newly built, and was finished except the painting and glazing; a workman, who was employed by the owner, slept in it for the purpose of protecting it; but no part of the owner's family or servants had ever taken possession of it: it was held, that this was not a dwellinghouse (*b*). But the building in question was clearly a barn within the meaning of the statute, as appears from the principle of the very case above cited. The result of the decision in that case is, that it is not the intended purpose for which a house is built, nor the manner or form of its construction, which constitutes it a dwellinghouse, but the purpose for which it is actually used—the fact of its being inhabited. Now here the building had been intended for a dwellinghouse, but had been actually used as a barn; and as the actual use of a building for inhabiting in one instance makes it a dwellinghouse, so the actual use of this building as a depository for straw and implements

(*a*) 1 Leach, C. C. 186, n (3d ed. 222.)

(*b*) So, a house into which the owner has only removed his goods, but in which he has not slept, is not his dwellinghouse as to the crime of burglary. *Rex* v. *Thompson*, 2 Leach, C. C. 771; 2 East, P. C. 498. So, a house under repair, but not inhabited, is not the dwellinghouse of the owner, though part of his property be deposited therein. *Rex* v. *Lyons*; 1 Leach, C. C. 185, (3d ed. 221.) So, where the owner of a house has never by himself, or by any of his family or servants, slept in the house, it is not his dwellinghouse, so as to make the breaking in and stealing goods thereout burglary, though he have used it for his meals, and all the purposes of his business. *Rex* v. *Martin*, R. & R. C. C. 108; 2 Russ. Crimes & Misd. 18. So, if the owner of a house has no intention of residing in it himself, it cannot be considered his dwellinghouse, although his servant sleep in it every night, if his sleeping there be merely to protect the furniture. *Rex* v. *Davies*, 2 Leach, C. C. 876; 2 East, P. C. 499.

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of husbandry, being the purpose for which a barn is ordinarily used, made this a barn.

Russell, Serjt. contrà. It is admitted that this building is not a house or outhouse: neither is it a barn. It certainly is not a barn in the ordinary acceptation of that term; it was not intended to be used for the purposes for which barns are generally used; it was not constructed in the manner or form in which barns are generally constructed. Now the subject-matter of the offence ought to come within the ordinary and established meaning of the words in the statute, *Rex* v. *Judd* (*a*), where a defendant, who had been committed for setting fire to a parcel of *unthreshed wheat*, was admitted to bail, the Court being of opinion that as the statute mentioned the offences of setting fire to a cock, mow, or stack of corn only, the warrant did not charge the defendant with any offence within it. The building in question is certainly not a barn within the ordinary and established meaning of that word; it can only be described as "a house used as a barn," if, indeed, it is capable of any legal or certain description at all. The question in the present case is precisely the same as that which must have been raised upon the trial of a party on an indictment for setting fire to this building, namely, has any capital offence been committed; or, in other words, is this a building in respect of which the crime of arson can be committed? The answer to that question must be, that no capital offence has been committed, that the building could not possibly be so described in an indictment as to make it the subject-matter of the crime of arson. *Rex* v. *Fuller*, cited on the other side, and other authorities which might be mentioned (*b*), make it clear that it could not be described as a house. *Hiles* v. *The Hundred of Shrewsbury* (*c*) proves also that it could not be described as an outhouse, because that case shews that in an action against the hundred for damage sustained by the maliciously setting fire to an outhouse,

(*a*) 2 T. R. 255. (*b*) Vide *ante*, 515. (*c*) 3 East, 457.

the building burned must appear to have been so far connected with the dwellinghouse as to be parcel thereof, and to have been such an outhouse in respect of which arson might have been committed at common law. Then would an indictment, describing this building as a barn, be sustainable? Clearly not. The evidence in the case is wholly inconsistent with such a description. It was built for a house; it was intended to be used as a house; it was in fact a house, though unfinished and uninhabited; and the temporary use of it as a barn could not alter its real nature, or justify the description of it as a barn. The statute, which is highly penal, must be construed strictly; it has always been so construed; *Rex* v. *Judd* (*a*), *Rex* v. *Donovan* (*b*), *Rex* v. *Winter* (*c*), *Hale, P. C.* c. 49, p. 59, 2 *East, P. C.* 1021; and it would be breaking through that rule of construction, and introducing a dangerous laxity, to hold that this building came within any one of the denominations given in the statute.

Cur. adv. vult.

BAYLEY, J.—This was an action upon the 9th *Geo.* 1, c. 22, brought by the plaintiff against the inhabitants of the hundred, to recover damages for the wilful destruction by fire of his house, outhouse, and barn; and the question is, whether the building which was so destroyed answered the description of a house, outhouse, or barn, within the meaning of that statute. It was in evidence that the building was constructed for the purpose of being used as a dwellinghouse, that it was in an unfinished state, and that it never had been inhabited. It was conceded in argument, on the part of the plaintiff, that it was not a house within the meaning of the statute 9 *Geo.* 1, c. 22. It has been decided that that statute does not alter the nature of the crime, or create any new offence; and that its only operation is to exclude the principal from the benefit of clergy, more clearly than

(*a*) 2 T. R. 255.
(*b*) 1 Leach, C. C. 81.
(*c*) R. & R. C. C. 295.

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he was excluded previously (*a*). It is perfectly clear, that the building in question was not a house in respect of which burglary or arson could have been committed. It was a house intended for inhabitancy, but it was never in fact inhabited. It was not, therefore, a dwellinghouse, though it was intended to be one. Neither was it an outhouse, because it was not parcel of a dwellinghouse. But it was insisted that it came within the description of the statute as a barn, because it had been used for those purposes for which a barn is ordinarily used. The building consisted of three stories, and it had a staircase, chimneys, and windows. The plaintiff had deposited in it for about two years, and it contained at the time of the fire, straw and agricultural implements. Upon consideration, we are of opinion, that this building was not a barn, within the meaning of that word, as it is used in this act of parliament. In common parlance no one would predicate of it that it was a barn; it was, in reality, a house applied to those purposes to which a barn might be applied. The statute of 9 *Geo.* 1, c. 22, though in some respects remedial, is in others capitally penal. It renders the hundred liable to make satisfaction to the party damaged by the burning of a house, outhouse, or barn, provided a capital offence be committed against the statute by such burning. The statute, therefore, with reference to a case like the present, must be construed strictly, and, so construing it, we are of opinion, that the building destroyed by fire in this case was not a house, outhouse, or barn, within the meaning of this act of parliament; and in that opinion, Lord *Tenterden*, with whom we have conferred upon the case, concurs. The rule for entering a nonsuit must, therefore, be made absolute.

Rule absolute (*b*).

(*a*) See 2 East, P. C. 1021.

(*b*) The 9th *Geo.* 1, c. 22, was wholly repealed by the 7 & 8 *G.* 4, c. 27, and the liability of hundreds is now, by the 7 & 8 *Geo.* 4, c. 31, confined to cases where any of the property therein enumerated is "feloniously *demolished, pulled down, or destroyed*; wholly or in part, by any persons *riotously and tumultuously assembled together*."

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The KING *v.* The JUSTICES of LANCASHIRE.

THIS was a rule calling upon the defendants to shew cause why a writ of *mandamus* should not issue directed to them, commanding them to enter continuances and hear the appeal of one *Kershaw*, a surveyor of the roads within a certain district in the county of Lancaster, against an order of two justices of the same county, made under 4 *Geo.* 4, c. 95, s. 80 (*a*), for him to pay to the treasurer of the turnpike act for the same district, a certain sum of money as composition for statute duty. It appeared upon the affidavits that the order in question was made on the 5th of March. Whether *Kershaw* was present when the order was actually *signed*

The "cause of complaint" against an order of justices upon a surveyor of highways to pay over composition money, under 4 *Geo.* 4, c. 95, does not "arise" until such order is served.

Notice of appeal, given within six days after such service is valid.

Surveyor not bound to attend when the list of persons liable to statute duty is laid before the justices; and therefore not presumed to be present when such order is made.

(*a*) Which enacts that two justices for the county, &c. may determine what proportion of statute work shall yearly be done upon roads within the county, &c. and what proportion of the money received by surveyors of highways as a composition for such statute work shall be by them paid to the commissioners or their treasurers; and that every such surveyor shall, *on an order in writing made by two justices, and delivered to him, or left at his place of abode*, deliver to the turnpike surveyor, or at his place of abode, within ten days afterwards, lists in writing of the persons liable to do statute work, or to the payment of money as a composition for such statute work; and that the turnpike surveyor, having received such lists, shall within fourteen days afterwards give notice to the surveyor of highways of the time when such lists will be laid before the justices to apportion the statute duty; and that at the time so appointed such lists shall be laid before the justices by the turnpike surveyor, in the presence of the surveyor of highways *(if he shall attend,)* and out of such lists the justices shall appoint so many persons liable to do statute work as they shall think reasonable; and that the justices shall order every surveyor of highways to pay over to the commissioners, or their treasurer, such proportion of the composition money as they (the justices) shall think proper, &c.

By s. 87, if any person shall think himself aggrieved by any *order*, &c. made, or by any matter or thing done, by any justice, &c. in pursuance of this act, or any local act, &c. he may appeal to the next general or quarter sessions, first giving to such justice, &c. by whose act he shall think himself aggrieved, notice in writing of his intention to bring such appeal, and of the matter thereof, *within six days after the cause of such complaint shall arise*, and within four days after such notice, entering into recognizances, &c.

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did not distinctly appear; but he was present when it was "*pronounced.*" A copy of the order was served upon *Kershaw*, on the 10th of March. *Kershaw* gave notice of appeal on the 14th of March. The question was whether that notice was given in due time, within the meaning of the appeal clause, s. 87. If the six days there mentioned were to run from the day on which the order was *made*, the notice of appeal was too late; if they were to run from the day when the order was *served on Kershaw*, the notice was in time. The sessions being of opinion that the six days ran from the day of *making* the order, and therefore that the notice was too late, refused to hear the appeal.

Armstrong, shewed cause. The notice of appeal should have been given within six days after the order of the justices was *made;* therefore it was too late, and the sessions were right in refusing to hear the appeal. There is no ground for saying that the time for giving notice runs from the day when the order is *served*, for there is no provision in the act of parliament that it shall be served. Neither in this case was there any necessity that the order should have been served, for the appellant was present when it was pronounced, and therefore must be presumed to have been sufficiently acquainted with its contents to be able to obey them: so that the written copy, when served, could tell him nothing of which he was not previously informed. This was not an ex parte proceeding, and that, according to the case of *Prosser* v. *Hyde* (*a*), is a ground for saying that the time for giving notice of appeal ran from the time when the order was made. That was the case of a conviction, but the order here is in the nature of a conviction; the party was aggrieved, if ever, from the moment the order was pronounced: and he was in contempt, if he was not

(*a*) 1 T. R. 414, where it was held, that an appeal against a conviction under the 24 *Geo.* 3, c. 21, (24 *Geo.* 3, sess. 2, c. 31,) for not entering horses, &c. must be to the quarter sessions next after the conviction, and not after the execution.

aggrieved, from the same moment. That the appellant was bound, and therefore must be presumed to have been aware of the contents of the order, is clear, because by the terms of the act of parliament he is required to furnish to the magistrates the very documents from which the order was made (*a*). It was decided in *Rex* v. *The Justices of Pembrokeshire* (*b*), with respect to an order for stopping up a road, that an appeal to the sessions next after the actual obstruction of the road was too late, the party having had sufficient notice of the order in time to have appealed to a preceding sessions, before which time the surveyors had begun to stop up the road; and in *Rex* v. *The Justices of Staffordshire* (*c*), it was further held, that the appeal must be made to the sessions next after the order made, without reference to any notice received by the appellant of the order. [*Bayley*, J. The order in those cases was of a very different nature from that in the present case. An order for stopping up a road is not addressed to any individual, but to the public at large; therefore it need not be served upon any individual.] This is a public order in its nature; it is, indeed, addressed to the surveyor; but in his public not his individual capacity: at least it is not an ex parte proceeding. The act of parliament does not require that the order shall be served; service of it could have given no information or advantage to the appellant: and then the mere fact of its having been served unnecessarily ought not to prejudice the case. To hold that service is necessary would tend to defeat the object of the act of parliament, for in many cases it might be impossible to serve the order, from the party's keeping out of the way, or other causes.

Coltman, contrà. The question in this case depends entirely upon the meaning to be given to that part of the appeal clause, which requires notice of appeal to be given "within six days after the *cause of complaint* shall arise" (*d*).

(*a*) S. 80, *ante*, 519, (*a*).
(*b*) 2 East, 213.
(*c*) 3 East, 151.
(*d*) S. 87, *ante*, 519, (*a*)

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Now the party is not "aggrieved" by the order, and consequently no "cause of complaint arises" to him, until the order is drawn up in writing, and served upon him; for till that is done, he has no notice of its contents. The appellant could not be deemed in contempt until after he had been served with the order; nor could an indictment for disobedience of the order be supported against him, without proving such service. The decisions in the two cases last cited proceeded upon the particular words of the act of parliament then in force (*a*), very different from the words here, which limited the appeal to the next sessions "after such order made or proceeding had." They have, therefore, no bearing upon the present case, because in the present act of parliament the words are "after the cause of complaint shall arise." But in *Rex* v. *The Justices of Devon* (*b*), which turned upon the 13 *Geo.* 3, c. 78, s. 80, the words of which are the same as those in the present act, it was held, that a notice of appeal against a distress for nonpayment of a highway rate, might be within six days after the levy, and need not be within six days after the granting of the warrant of distress: the ground of that decision being that the seizure under the warrant, and not the making of the warrant itself, was "the cause of complaint." Again, the statute requires that the notice of appeal shall set forth "the matter thereof." How is it possible that a proper notice can be given, consistently with that regulation, unless the party has first seen the order against which the appeal is to be made? The notice of appeal must in some respects follow the language of the order, and if a party attempted to frame a notice without having the order before him, he would in all probability fall into some error or defect which would be fatal to him at sessions. Lastly, the respondents, by serving the appellant with the order in this case, have put their own construction upon the act of parliament, consistent with that for which the appellant now

(*a*) 13 *Geo.* 3, c. 78, s. 19. (*b*) 1 M. & S. 411.

contends, and they ought not to be allowed to argue in support of a different construction now.

BAYLEY, J.—I am of opinion that a *mandamus* ought to go to the sessions to hear the appeal in this case. The statute requires that the notice of appeal shall be given "within six days after the *cause of complaint shall arise*," which, I think, as applied to this case, means, from the time of the service of the order. It seems to me that the order of the justices was not complete until the party had possession of it, and that the cause of complaint did not arise until the order had been served. The mode of proceeding pointed out by the statute is this: a list of the persons liable to do statute duty is first to be obtained; a time is fixed for a meeting; and then the surveyor of the township is to receive notice to attend. At the meeting, the list is to be laid before the justices, in the presence of the surveyor, "*if he shall attend*;" but there is nothing in the statute that renders it obligatory on him to attend. Then the justices may make an order for the performance of statute duty, &c., but they are not bound to order that any individual liable to perform statute duty shall perform it on the turnpike road. They may order certain persons to perform statute duty, and it is evident from the nature of the thing, that their order must be in writing, for they are to specify the names of the parties, the days of duty, and the parts of the road; and it would be impossible for the surveyor, even if present when the order is made, to carry all those particulars in his mind. In addition to this, the justices may order the payment of composition money "at any time or times;" and they are to specify the amounts, the proportions, and the periods of payment. In this case the proportion to be paid was verbally fixed, but it does not appear that the time of payment was mentioned; and in that respect, therefore, the order was clearly incomplete, and could not be rendered complete until it was reduced into writing, and served upon the party whom it was in-

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tended to bind. Parties are often present in this Court when rules are pronounced, but a rule of this Court is not complete, nor can a party be brought into contempt for not obeying it, until it has been served upon him. The appeal clause in this statute plainly indicates that the contents of the order shall be communicated to the party, for it requires him to state in his notice the ground and matter of his appeal, which it is impossible for him to do correctly, except by reference to the order itself. Again, the statute does not make it imperative upon the surveyor of the township roads to attend before the justices, and it is extremely desirable to have one uniform system of practice in all cases, whether the surveyor be present or not. We ought not to throw upon the surveyor the burthen of attending, as the legislature have not expressed their intention to do so; and the proper mode of construing the statute seems to me to be, to hold that the order must be in writing; that the order must be served; and that the time for giving notice of appeal is to run from the time of serving the order. Upon these grounds I am of opinion that the notice of appeal in this case having been given within six days after the order in writing was served, was in good time, and that the rule for a mandamus to hear the appeal ought to be made absolute.

HOLROYD, J.—I am entirely of the same opinion. I think there is no duty imposed upon the surveyor by the order until he has been served with a written copy of it, and consequently that till then, he has no "cause of complaint" against it.

LITTLEDALE, J. concurred.

Rule absolute.

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PAUL and others *v.* ELIZABETH NURSE and EDMUND NURSE.

Assignee of lessee is not liable for rent accruing after an assignment over, though wrongful.

A covenant by lessee that he, his *executors and administrators*, shall not assign without licence, is not binding upon *assignee* of lessee. *Semble.*

COVENANT. The declaration stated that one *Cheatle*, deceased, being seised in his demesne as of fee of, &c., on the 30th April, 1816, at &c., by a certain indenture then made between *Cheatle* of the one part, and one *Copeland* of the other part, *Cheatle* for the considerations therein mentioned, granted and demised to *Copeland*, *habendum* to *Copeland*, his executors and administrators, from 11th October, 1815 (*a*), for 21 years, at a rent of 80*l.* payable half-yearly. Covenant by *Copeland* for payment of rent. Averment, that all the estate, right, title and interest of *Copeland* by assignment vested in defendants, whereupon they, as assignees, entered upon the premises with the appurtenances, and became and still were possessed thereof, for the residue of the term; and that being so possessed, and the reversion belonging to *Cheatle*, he, on 27th March, 1823, by will, devised the reversion to plaintiffs, their heirs, &c., and died 8th September, 1826. Breach, non-payment of half a year's rent due 11th October, 1827. Plea, that before the rent accrued due, defendants assigned all their estate, &c. in the demised premises, to *Edmund Nurse* the elder. Replication, that by the indenture of lease *Copeland* for himself, his executors, administrators, and assigns, covenanted, that he, *Copeland*, his executors or administrators, would not assign, underlet, dispose of, or grant, any part of the thereby demised premises, to any person, without the consent of *Cheatle*, his heirs, or assigns; and that neither *Cheatle* in his life time,

(*a*) The effect of such a retrospective *habendum* is not, as it sounds, to make the lessee tenant by relation from the prior day: it merely furnishes a *terminus* from which the years are to commence in *computation*. Thus,—a lease executed on the 24th June, *habendum* for 7 years from the 25th March preceding, means nothing more than a lease *habendum* from the 24th June for 6¼ years; the two expressions are precisely equivalent.

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nor plaintiffs since his death, had given any such consent. Demurrer to the replication, and joinder in demurrer.

F. Kelly for the plaintiffs. The question arising upon these pleadings is, whether a covenant by a lessee, his executors, administrators, and assigns, not to assign, continues in force, after the premises have once been assigned with the consent of the lessor; and if it does, whether the assignment pleaded by these defendants is not void, and they still liable to the plaintiffs. It must be admitted that if the lease had contained a proviso for re-entry upon breach of such a covenant, an action of ejectment could not have been maintained, because it would have been answered by the licence to assign, which would have had the effect of completely destroying the condition. But there is a distinction between proceeding for a forfeiture on the ground of a condition broken, and proceeding upon the covenant for the rent. This is a covenant which runs with the land. [*Bayley* J. But you must contend that it runs with the land after the land has been assigned with the licence of the lessor.] It was indeed held in *Dumpor*'s case (*a*), "that the alienation by licence to the assignee, had determined the condition, so that no alienation which he might afterwards make, could break the proviso, or give cause of entry to the lessors, for the lessors could not dispense with an alienation for one time, and insist that the same estate should remain subject to the proviso after." But the reasons given in that case apply to a condition, not to a covenant; and the rule of law there laid down has been considered as one not to be extended. *Doe* v. *Bliss* (*b*). The question in this case must be considered as if the cases upon conditions had never been decided. The intention of the parties must be taken into consideration, and the covenant must be construed accordingly. The covenant is inserted for the protection of the landlord, to prevent his being fixed with a tenant whose responsibility he has not the means of inquiring into. That

(*a*) 4 Co. Rep. 119 b. (*b*) 4 Taunt. 735.

object will be best promoted by holding that such a covenant will continue in force, so as always to prevent the tenant from assigning, without the licence of the lessor. If that be the correct view of the law, the assignment in this case is void, and the action maintainable. But even if the assignment be not void absolutely, still, as between the plaintiffs and the defendants, the latter cannot be allowed to set up their own breach of covenant in answer to the demand of rent, because the law allows no man to take advantage of his own wrong. The defendants, therefore, are estopped from pleading the assignment.

BAYLEY J. — In order to support this action, where there is no privity of contract, there must be a privity of estate between the parties on the record; but there is none in the present case. The obligation of the defendants to perform the covenant for the breach of which the plaintiff sues, namely, for the payment of rent, attached to them so long as they filled the character of assignees of that estate which the lessee had under the lease; but no longer. Their obligation arose out of a privity of estate between them and the plaintiff; as soon as they ceased to be assignees, that privity of estate ceased, their estate as assignees was divested, and they ceased to be bound by the covenant. The only remedy open to the plaintiff is an action upon the covenant not to assign; and it may be doubted whether the defendants are within that covenant; for the word assignees is not inserted; the lessee only covenants that he, his executors and administrators will not assign without licence. The defendants, therefore, are entitled to the judgment of the Court.

The other Judges concurred.

Judgment for the defendants.

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A bill of Middlesex is a good continuance of a latitat issued with intent to implead upon the same cause of action.

DECLARATION, in assumpsit, by payee against maker of a promissory note, dated 18th April, 1814. Plea, that the causes of action mentioned in the declaration did not accrue within six years next before the exhibiting of plaintiff's bill. Replication, that within six years after the several causes of action accrued to plaintiff, to wit, on 30th June, 1819, in the 59th *G. 3*, plaintiff, for recovery of his damages by him sustained by reason of the not performing the several promises and undertakings in the declaration mentioned, sued out a latitat, whereby, (after reciting a previous bill of Middlesex, commanding the sheriff of that county to take defendant and him safely keep, so that he might have his body to answer plaintiff of a plea of trespass, and also to a bill of plaintiff to be exhibited against defendant for *300l.*, upon promises, and a return of *non est inventus* thereto,) the king commanded the sheriff of Kent to take defendant, &c. to answer plaintiff in the plea and bill aforesaid. It then set out a return of *non est inventus*, and the non-appearance of defendant, and stated that plaintiff prayed another latitat to the sheriff of Kent, returnable on Monday next after eight days of St. Hilary, for defendant to answer to the plea and bill aforesaid; that on that day, in the Court of K. B. at Westminster, came plaintiff by his attorney aforesaid, and offered himself against defendant on the plea and bill aforesaid; and that the sheriff of Kent did not send the last mentioned writ, nor do any thing thereupon, nor did defendant appear in Court, according to the exigency of the said writ. Similar continuances were then stated, from term to term, to Easter term 1826. Wherefore plaintiff, for recovery of his damages by him sustained by reason of the not performing of the promises and undertakings in the declaration mentioned, prayed *another* precept, called a bill of Middlesex, against defendant, in form aforesaid, which was granted to him, returnable on Friday next after the morrow of the

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Holy Trinity, for defendant to answer plaintiff *in the plea and bill aforesaid*, and the same day, &c. Averment, that plaintiff and defendant appeared, and that the said several writs, and the said last mentioned precept respectively, were so sued out and prosecuted by plaintiff against defendant as aforesaid, with intent to implead defendant upon and for the said several causes of action in the declaration mentioned, and to cause and compel defendant to appear in the said Court here, in order that plaintiff might, upon such appearance, exhibit his bill and declare against defendant, for the said several causes of action in the declaration mentioned, &c. That plaintiff, afterwards, in Trinity term, 7th *G.* 4, did exhibit his bill and declare thereon against defendant; and that the said several causes of action did accrue to plaintiff within six years next before the issuing of the first mentioned writ. Rejoinder, that no precept, called a bill of Middlesex, against defendant, was sued out or prosecuted by plaintiff, previously to the said prayer of plaintiff of another precept called a bill of Middlesex, and so sued out and prosecuted by plaintiff against defendant, as in the replication was mentioned. Demurrer to the rejoinder, and joinder in demurrer.

Reader, for the plaintiff. It will not be disputed that a latitat, without a bill of Middlesex, if regularly sued out and continued on the roll, is a good commencement of a suit, to avoid a plea of the statute of limitations. That was decided so long ago as the case of *Coles* v. *Sibsye* (*a*). The latitat is for that purpose in the nature of an original writ. *Davey* v. *Clinch* (*b*), *Culliford* v. *Blandford* (*c*), *Brown* v. *Babington* (*d*), *Wood* v. *Newton* (*e*), *Foster* v. *Bonner* (*f*). In the present case, therefore, if the latitat was a good commencement of the action, the rejoinder is bad, because it states that no bill of Middlesex was sued out in the first instance; and then the question is, whether the bill of Middlesex

(*a*) Style, 156.
(*b*) 1 Sid. 53.
(*c*) Carth. 233.
(*d*) 2 Ld. Raym. 882.
(*e*) 1 Wils. 141.
(*f*) Cowp. 454.

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sued out after the last latitat is a good continuance of the action. Now it may have been impossible for the plaintiff to pursue any other course; if the defendant came into the county of Middlesex, for instance; for there no other process could reach him, service of a latitat in that county being irregular. *Price* v. *Jackson*(*a*). Suppose in this case a bill of Middlesex had been sued out in the first instance, and the defendant had gone into Kent or any other county, and a latitat had been sued out into that county, and the defendant had then returned into Middlesex; it is perfectly clear that a second bill of Middlesex might have been sued out, and would have been a good continuance of the original action(*b*). Every latitat presupposes the existence of a bill of Middlesex, and the want of a bill of Middlesex, in point of fact, is never any objection. If the latitat be a good commencement of the suit, a bill of Middlesex sued out in prosecution of the same suit must be a good continuance of that suit; for the process is of the same description, and shews all that is required to be shewn, namely, that the plaintiff is proceeding to bring the defendant into Court in the same suit which he

(*a*) 1 M. & S. 442, where the Court set aside a latitat *directed* to the sheriff of Middlesex for irregularity; but in *Kelly* v. *Shaw*, 6 T. R. 74, the Court refused to set aside the proceedings merely because the defendant was *served* with a latitat in Middlesex: and Mr. *Tidd* says, (i. 168, 9th ed.) "a latitat cannot regularly be served in any other county than that to the sheriff of which it is directed;" and cites 4 M. & S. 412, (*Chase* v. *Joyce*, M. 56 *G.* 3, K. B.) 1 Chit. Rep. 15 (*c*), 333 (*a*), as authorities; adding, "but see Dougl. 384, 1 T. R. 187, 6 T. R. 74, 8 T. R. 235, *semb. contrà*."

(*b*) Under such circumstances the most formal mode of proceeding would, perhaps, have been to issue an alias bill of Middlesex, adding to the common form of the *sicut alias* precept the words, "In respect whereof (*et unde*) the sheriff of Kent has lately returned to our lord the King that the said defendant is not found in his bailiwick." Such a recital need not be set out in the replication: *Plummer* v. *Woodburne*, 7 D. & R. 30, 4 B. & C. 630. Therefore upon this demurrer it would not appear whether that form was adopted or not; but if the defendant, instead of demurring, had taken issue upon the intent to implead upon the same cause of action, such a recital would have furnished the best evidence to support the replication; so if the *continuity* of the process had come in question upon taxation of costs.

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originally commenced against him. Besides, this at most would be a mere irregularity, and cannot prevail to the extent sought for. Process, which is voidable, if it be not absolutely void, is sufficient to take a case out of the statute of limitations. In *Karver* v. *James* (*a*), it was held that process returnable on a common return day, and not a day certain, and which was therefore voidable, was sufficient to save the statute of limitations. In Lord *Middleton* v. *Forbes* (*b*), it was decided that an action by original, brought by an administratrix within six years after the cause of action accrued, would enable the administratrix and her husband, whom she afterwards married, to recover in an action by bill by both, notwithstanding a plea of the statute of limitations. And in *Plummer* v. *Woodburne* (*c*), it was held that bailable process with an ac etiam clause, was a good continuance of a non bailable bill of Middlesex, so as to avoid the statute.

Comyn, contrà. The allegation in the rejoinder that no bill of Middlesex was sued out previous to the first latitat, assumes that if the suit had been commenced by bill of Middlesex, and continued by latitat, it might ultimately have been continued by a second bill of Middlesex; but the demurrer admits that allegation: therefore the only question arising upon these pleadings is, whether a bill of Middlesex is a good continuance of an action commenced by latitat without a previous bill of Middlesex. It is true, an action may be commenced by latitat, but the regular course is first to sue out a bill of Middlesex; for the latitat recites that a bill of Middlesex has issued, and that a return of *non est inventus* has been made: so that, primâ facie, a bill of Middlesex is the first process in a suit, and a latitat the second. The bill of Middlesex and the latitat are kept upon separate rolls; and the issuing of a bill of Middlesex, primâ facie, imports

(*a*) Willes, 255.

(*b*) Willes, 259, (*c*).

(*c*) 7 D. & R. 25, 4 B. & C. 625. The process in that case, upon which the defendant was arrested, was a mandate from the Chancellor of the County Palatine of Lancaster, upon a latitat directed to him. ED.

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the commencement and not the continuance of a suit. If the defendant, as has been assumed in argument, was in Kent when the first latitat issued, and had afterwards removed into Middlesex, and those facts had been stated on the record, the bill of Middlesex might, perhaps, have been a good continuance of the action, though commenced by latitat. But those facts do not appear upon the record, and they cannot be assumed to cure an irregularity. The plaintiff is bound to continue his suit by the same kind of process he commences with, unless he shew a sufficient excuse for changing it. Here he has changed his process, and has shewn no sufficient excuse for it; consequently the bill of Middlesex must be treated as being in fact, that which it imports to be, the commencement of a new suit, and not the continuance of a suit previously commenced by latitat.

BAYLEY, J.—I have no doubt that in this case the *bill* of Middlesex was a good continuance of the suit which had been commenced by latitat. It is quite clear that a latitat is a good commencement of a suit; it was so decided in *Johnson* v. *Smith* (*a*), and has been so considered in practice ever since. But it is said, a suit must be continued by process of the same kind as that by which it was originally commenced. To that I agree; but a bill of Middlesex and a latitat are process of the same kind for that purpose. The Court, by virtue of its jurisdiction over the county in which it sits, issues against parties resident in that county a process called a bill of Middlesex (*b*). If the defendant cannot be found in Middlesex, the Court issues a latitat into some other county. The latitat, therefore, issues upon the supposition that a bill of Middlesex has previously issued, and that the defendant could not be found in that county. In this case the replication sets out a latitat, whereby, (after

(*a*) 2 Burr. 950, 1 W. Bl. 207, 216.

(*b*) So entitled, *because* the Court now sits in that county; for if it sat in Kent, it would then be a *bill of Kent*. Thus, when the Court sat at Oxford, by reason of the plague, Michaelmas, 1665, the process was by *bill of Oxfordshire*. Trye's Jus Filizar. 101; 3 Bl. Com. 285, 18th edition.

reciting that a bill of Middlesex had issued, by which the sheriff of that county was commanded to take the defendant, &c. to answer the plaintiff in a plea of trespass, and to a bill to be exhibited against him,) the sheriff of Kent was commanded to take the defendant, &c. to answer the plaintiff in *the plea and bill aforesaid;* and by the latitat afterwards issued from term to term, and the bill of Middlesex ultimately issued in Easter term, 1826, the defendant was still called upon to answer the plaintiff in *the plea and bill aforesaid.* The last process, therefore, issued to compel the defendant to answer the plaintiff in the same plea, and to the same bill, which he was called upon to answer by the latitat originally sued out; so that even upon the face of the process itself it would rather appear that the bill of Middlesex and the latitat issued in the same suit. But the replication then goes on to aver, that the said several writs, and the said last mentioned precept respectively, were so sued out by the plaintiff against the defendant, with intent to implead the defendant upon the several causes of action in the declaration mentioned; and it must be taken that the bill of Middlesex and the latitat were issued with intent to prosecute the same cause of action. The rejoinder alleges that no bill of Middlesex was sued out by the plaintiff previous to that which issued after the last latitat; but as it has been decided that a suit may be well commenced by a latitat without a previous bill of Middlesex, that allegation is wholly immaterial, and the rejoinder is no answer to the replication. Then is the replication in itself good? I am of opinion that it is. A suit commenced by latitat must be continued by process of the same kind, and it is so here, for a bill of Middlesex and a latitat are process of the same kind for that purpose. They are frequently issued in the same suit, and one instance has been put in argument, where a bill of Middlesex would be the only process by which a suit commenced by latitat could regularly be continued. It is clear, therefore, that a bill of Middlesex may be a good continuance of a suit commenced by latitat, and as it appears by the replication that

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the bill of Middlesex in this case was issued with intent to implead the defendant upon the same causes of action as those for which the latitat was issued, I think it was a good continuance of this suit. For these reasons I am of opinion that the suit which was originally commenced by latitat in this case, was regularly continued by the bill of Middlesex, and therefore that the plaintiff is entitled to the judgment of the Court.

HOLROYD J. concurred.

LITTLEDALE J. was absent.

Judgment for the plaintiff on demurrer.

SWANN *v.* The EARL of FALMOUTH and JENNINGS.

Landlord's agent walked round a demised wharf, left a written notice that he had distrained goods lying there for rent, and that they would be appraised and sold, if not replevied, &c. He then went away, leaving no one in possession:— Held, an actual seizure; and no abandonment as between landlord and tenant, in an action for an excessive distress.

CASE for an excessive distress. Plea, not guilty, and issue thereon. At the trial, before *Gaselee*, J. at the last assizes for the county of Cornwall (*a*), the case was this. The plaintiff carried on business as a dealer in coals, timber, iron, &c. upon a wharf called Point Quay, which he held as tenant to the Earl of *Falmouth*, at a rent of 150*l.* a year. In 1827, rent being in arrear to the amount of 262*l.* 10*s.*, *Jennings*, who was clerk to the Earl's attorney, on the 9th of January, went to the wharf, and inquired for the plaintiff. Being told, that the plaintiff was not there, he said, "Mr. *C.*, Lord *Falmouth*'s steward, is now on the wharf, and intends to distrain for Lord *Falmouth*'s rent." *Jennings* and the steward then walked round the wharf, where several separate parcels of goods belonging to the plaintiff were lying, and afterwards went away, leaving the following notice of distress, signed by *Jennings*. "Take notice, that by virtue of a proper authority from the Earl of *Falmouth*, I have this day taken and distrained at Poiut Quay, and the cellars and premises thereunto belonging, situate, lying,

(*a*) Counsel for the plaintiff, *Erskine* and *Coleridge;* for the defendants, *Wilde*, Serjt. and *Follett*.

and being in the parish of Feock, in the county of Cornwall, which you now hold of him at the yearly rent of 150*l.*, the following goods and chattels, to wit, a quantity of coals now lying in heaps on Point Quay aforesaid, a quantity of slate ditto, a quantity of balk ditto. All which goods and chattels I have left on the said premises, and have distrained the same for the recovery of the sum of 262*l.* 10*s.*, due to him at Christmas last, for rent and arrears of rent of the said premises. And you are further to take notice, that unless you pay the said rent and arrears so due, together with the costs and charges of this distress, or cause the said goods and chattels to be duly replevied, within five days from the delivery hereof, the same will be appraised and sold according to law. Dated 9th January, 1827." The goods so seized were worth upwards of 1000*l.* *Jennings* and the steward did not leave any person in possession. On the 12th of January the plaintiff requested that the handbills which had been printed, giving notice of the sale, might not be published. This was consented to, and the plaintiff afterwards paid the arrears. This seizure of the goods prevented the plaintiff from carrying on his business for some days. Upon this evidence it was contended on the part of the defendants, that there had been no seizure of the goods in point of law, such as would support the action, the mere act of walking round the wharf, without marking or touching the goods, and without leaving any person in possession, not amounting to a seizure. The learned Judge overruled the objection, and left the case to the jury, who found a verdict for the plaintiff, damages 40*l.* In Easter term a rule *nisi* for a new trial was obtained on the ground, first, that no seizure had been proved, and secondly, that the damages were excessive.

Erskine and *Coleridge* now appeared to shew cause, but the Court desired to hear

Follett in support of the rule. There was no seizure. The goods were never placed in the custody of the law. The

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plaintiff might have used them, or sold them, at any time, and his forbearing to do so from a mistaken idea that they were in the custody of the law, did not give him a right of action. He would not have been indictable for any offence in disposing of the goods, therefore he has not been damnified by the acts of the defendants, and has no cause of action. The only offences that could have been imputed to him, were rescous or pound breach; and neither of those could have been brought home to him. To constitute rescous the goods must be wrongfully taken out of the possession of the distrainor before they are impounded; and they must be taken out of his *manual* possession; *Fitz. N. B.* 102, F. *Dod* v. *Monger* (*a*). The latter is a direct authority in favour of the defendants. It was an action for a rescous; there had been an actual seizure; but the person left in possession abandoned the possession for two nights; and it was held that there could be no remedy for a rescous by the tenant subsequent to an abandonment by the distrainor. Here, no person was ever left in possession at all; indeed, the goods were never taken out of the possession of the plaintiff himself. Then would the plaintiff have been liable to an indictment for a pound breach? Clearly not. Lord *Falmouth* could not have maintained an action for a pound breach, for the merely giving notice of distress, without making an actual seizure, will not suffice for that purpose. *Blades* v. *Arundale* (*b*). It may be difficult, since the passing of the statute 11 *Geo.* 2, c. 19, to say, what is an impounding. Prior to the passing of that act, there was no difficulty, because it was necessary to remove the goods from off the premises. Under that act, the goods may be impounded on the premises where they are seized, for it declares, in s. 10, that "it shall be lawful to impound, or otherwise secure the distress in such place, or on such part of the premises, as shall be most fit and convenient." But even that seems plainly to involve the necessity of the party doing some act to denote the im-

(*a*) 6 Mod. 215. (*b*) 1 M. & S. 711.

pounding, or securing; and the most easy and proper act, is, the leaving a man in possession. The practical directions in *Gilbert on Replevin* say, that the safest course is to leave a man in possession. The statutes 57 *Geo.* 3, c. 93, and 7 and 8 *Geo.* 4, c. 17, which were passed for the purpose of regulating the expenses of distresses, allow for the expense of keeping a man in possession, although their professed object is to diminish the expenses of the proceeding: from which it seems reasonable to infer that the legislature considered the keeping a man in possession as an act essential and necessary to the landlord's right. These goods might have been taken by the sheriff under an execution as the goods of the plaintiff, which they could not have been if they were duly impounded. That is clearly laid down in *Blades* v. *Arundale* (*a*). There, goods had been seized by the sheriff, and the warrant locked up in a drawer by the officer, who then left the premises; whereupon the landlord seized for rent; and it was held, that the subsequent seizure was good, the first having been abandoned. Here, if possession was ever taken, it was clearly abandoned when the parties left the premises, without putting any person in possession. The application afterwards made by the plaintiff for a postponement of the sale cannot vary the question of possession. The act done by the defendants was wholly inoperative and void, and therefore gave the plaintiff no right of action. In *Owen* v. *Legh* (*b*), where standing corn was seized as a distress, and sold before it was ripe, this Court held that the sale was altogether void, and therefore gave no right of action to the tenant. At all events, the defendants are entitled to a new trial, upon the ground of excessive damages, for no actual loss or injury was proved to have been sustained by the plaintiff.

Erskine, at the suggestion of the Court, consented that the damages should be reduced to 20*l.* and that point was consequently abandoned.

(*a*) 1 M. & S. 711. (*b*) 3 B. & A. 470.

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BAYLEY, J.—I am not convinced by the reasoning of the counsel for the defendants in this case, ingenious as it is. The question here is, not between the landlord and a third person, but between landlord and tenant, and the points to be considered are, first, whether there ever was a seizure at all, and if there was, secondly, whether there was afterwards such an abandonment of the distress by the landlord, as would have debarred him of his right to treat the tenant as a wrong-doer, in case he had disposed of the goods. Lord *Falmouth*'s steward and attorney went upon the plaintiff's premises for the purpose of distraining the goods. They left a written notice that they had distrained the goods. That notice is evidence against the landlord that they had actually made a distress. Then was that distress abandoned? It is said that it was, because no person was left in possession; and if that be so, undoubtedly the possession re-vested in the tenant. By the statute 11 *Geo.* 2, c. 19, s. 10, the landlord is empowered to "impound, or otherwise secure upon the premises," the goods that he has distrained. Then look at the notice of distress in this case. It states, that the goods have been distrained, and that unless they are replevied, or the rent paid, within five days, they will be appraised and sold. It also states that *Jennings* has left the goods on the premises. That does not indicate any intention to abandon the distress, but does indicate an intention to leave the goods in the custody of the law upon the premises, which he had a right to do. The case of *Dod* v. *Monger* must be looked at with reference to the state of the law at the period when it was decided. At that time the landlord had no right to keep the goods on the premises, and, therefore, if he quitted possession of the goods while they remained on the premises, that was an abandonment of the distress; but the merely leaving the goods in a place where he has a right to keep them, without any thing indicating an intention to abandon the distress, cannot operate as an abandonment. If this were otherwise, great hardship would be thrown

upon the tenant, because then, whenever a landlord distrained upon premises where it was not possible for a man to be left in possession, he would be under the necessity of immediately removing the goods. In the present case, it was unreasonable to expect that any agent or servant of the landlord should remain in the possession of goods lying on an open wharf during the night; and if that had been necessary in order to retain possession, the goods must have been removed to some other place, which would have worked serious mischief to the tenant.

HOLROYD, J.—The tenant solicited the indulgence of a postponement of the sale, and thereby recognized what had been done as amounting to an actual distress and seizure. I think this case, in principle, resembles those where a party submits to an arrest without the corporal touch of the officer, and yet has a right of action if the arrest be illegal (*a*).

LITTLEDALE, J. — As between these parties I think there was originally a good seizure; and I am clearly of opinion, that there was no abandonment, because since the statute 11 *Geo.* 2, the landlord has a right to keep the goods upon the premises of the tenant. If the question had arisen between the landlord and an execution creditor or a purchaser for a valuable consideration without notice, the case might have been different; because, as against third persons, the landlord might perhaps have been considered as having lost his right by neglecting to give reasonable notice of it.

Rule discharged.

(*a*) As to which see *ante*, i. 215, (*a*); *Reece* v. *Griffith*, *post*, iii.

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A., in 1819, demises lands to *B.* for 100 years, and subject thereto he, in 1820, demises for 200 years to *C.*, who enters. In 1822 *D.* recovers judgment against *A.* *D.* issues and executes an *elegit*, under which the lands are delivered in execution. *C.* is entitled to the possession as against *D.*; it not appearing that *B.* had entered under the demise to him.

TRESPASS for mesne profits. Plea, as to a moiety of the lands, that *Parker*, in Hilary term, 1822, recovered a judgment in K. B. against the Right Honourable *John Evelyn Pierrepoint*, Lord *Dormer*, for 400*l.*; that *Parker*, for obtaining execution thereof, sued out of K. B. an *elegit* thereon; that by an inquisition held, it was found that Lord *Dormer* was seised for life of, among others, the lands described in the declaration, which, with other lands described in the inquisition, were a moiety of the lands of the said *John E. P.* Lord *Dormer*, in the sheriff's bailiwick, which moiety the sheriff delivered to *Parker*, to hold as his freehold: that in execution of the writ, *Cotterell*, as bailiff and in aid of the sheriff, and by his command, entered the lands described in the declaration, and ejected plaintiff, and put in *Parker;* and that *Parker* accordingly took possession thereof, the same being a moiety of the lands described in the inquisition. Replication, that the *said* Lord *Dormer*, being seised for life of the lands described in the declaration, before the day of giving judgment, to wit, on the 14th March, 1820, by indenture then made between the *said* Lord *Dormer* of the first part, *W. S.* and *J. C.* of the second part, and plaintiff of the third part, demised to plaintiff, his executors, &c., among others, the lands described in the declaration, for a term of 200 years; by virtue of which plaintiff entered, and became possessed for the said term, and continued so possessed until defendants entered. Defendants craved oyer of the indenture, which was set out. It was made between the Right Hon. *Evelyn Pierrepoint*, Lord *Dormer*, Baron *Dormer*, of the first part; *William Samler* and *John Coope*, two of the directors of a society called "The Pelican Life Insurance Company," and acting on the part of the said society, of the second part; and plaintiff of the third part. It recited, that by indenture of 18th June, 1819, made between the said *Evelyn Pierrepoint*, Lord *Dormer*, of the first part;

W. S. and *J. C.* of the second part; and *T. Dawes* of the third part; in consideration of 14,998*l.* paid to the said *E. P.* Lord *Dormer* out of the funds, and on the behalf of the society in manner therein mentioned, he the said *E. P.* Lord *Dormer* had granted unto the said *W. S.* and *J. C.*, their executors, &c., an annuity of 1725*l.*, to be paid for 99 years, to be computed from the day next before the date of the indenture, and thenceforth if the said *E. P.* Lord *Dormer* should so long live, to be charged upon and payable out of, among others, the lands described in the declaration, for 99 years, and that he the said *E. P.* Lord *Dormer* had demised unto the said *T. Dawes*, his executors, &c., among others, the lands described in the declaration, for 100 years, to be computed from the day next before the date of the said indenture, if the said *E. P.* Lord *Dormer* should so long live, in trust to pay the said annuity out of the rents and profits. It further recited, that the said *E. P.* Lord *Dormer* had agreed with the said *W. S.* and *J. C.* for the absolute sale to them, as two of the directors of the said company, on behalf of the company, of an annuity of 800*l.*, to be paid to *W. S.* and *J. C.*, their executors, &c., for 99 years, to be computed from the day next before the date of the indenture of 14th March, 1820, if the said *E. P.* Lord *Dormer* should so long live, at and for 6998*l.*, and that, in pursuance of such agreement, *W. S.* and *J. C.* had paid that sum to the said *E. P.* Lord *Dormer*; and that upon the treaty for the purchase of the said annuity of 800*l.* it had been agreed that the annuity of 1725*l.*, and all powers, remedies, and trusts for securing the same, should be ratified and confirmed, and, subject thereto, that the annuity of 800*l.* should be charged upon, among others, the lands described in the declaration. It then witnessed, that in pursuance of that agreement, the said *E. P.* Lord *Dormer* had ratified and confirmed the annuity of 1725*l.* granted by the indenture of 18th June, 1819, and that in pursuance and further performance of the said agreement, and in consideration of 6998*l.* paid to him by *W. S.* and *J. C.*

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as thereinbefore mentioned, the said *E. P.* Lord *Dormer* had granted, bargained, sold and confirmed to *W. S.* and *J. C.*, their heirs, executors, &c., an annuity of 800*l.* to be paid for 99 years, if the said *E. P.* Lord *Dormer* should so long live, to be charged upon, among others, the lands described in the declaration. It further witnessed, that in consideration of 6998*l.* paid to the said *E. P.* Lord *Dormer*, as thereinbefore mentioned, and for the further and better securing the regular payment of the said annuity of 800*l.* to *W. S.* and *J. C.*, their executors, &c., and in consideration of 10*s.* paid to the said *E. P.* Lord *Dormer* by *Chatfield*, the said *E. P.* Lord *Dormer* demised to *Chatfield* the lands described in the declaration, which were before charged with the payment of the said annuity of 800*l.*; to hold the lands thereinbefore granted, and every part and parcel of the same, but subject and charged as thereinbefore was mentioned, to *Chatfield*, his executors, &c., for 200 years, to be computed from the day next before the date of the indenture, and thenceforth and fully to be complete and ended, without impeachment of waste, if the said *E. P.* Lord *Dormer* should so long live (*a*). The defendants then demurred specially to the replication, assigning as causes, that the commencement of the supposed life estate of Lord *Dormer* was not shewn in the replication; that the replication did not shew how Lord *Dormer* became

(*a*) Until entry, *W. S.* and *J. C.* had only an *interesse termini*, (Co. Litt. 47, b.; 270, a.; 296, a.; 338, b.;) which would not prevent the right of possession vesting in a party entering under a subsequent demise, though such right of possession would be determinable upon the entry of *W. S.* and *J. C.* If the conveyance to *W. S.* and *J. C.* had been of such a nature as to pass an estate for 100 years, without any act being necessary to be done on their part, (as if the demise had been by way of appointment, or by the limitation of a use in any other mode,) *Chatfield* could not have set up the immediate demise to himself as an estoppel against Lord *Dormer* and his assigns; first, because an interest passed, (2 Wms. Saund. 418 (1),) the deed operating as a grant of the reversion for 100 years; and secondly, because it is said that no estoppel arises where it appears on the face of the deed that the party has not the interest expressed to be conveyed. *Ante*, 513, (*a*).

tenant for life; that it did not shew that Lord *Dormer*, the lessor in the demise, was called by the same name as the said Lord *Dormer* mentioned in the plea; and that it did not shew that Lord *Dormer* had power to make a valid demise to the plaintiff. Joinder in demurrer.

E. Lawes, serjt., in support of the demurrer. The replication is bad on several grounds. First, it does not shew the commencement of Lord *Dormer*'s life estate, which it ought to do; for "general estates in fee simple may be generally alleged; but the commencement of estates tail, and other particular estates, regularly must be shewed, unless in some cases, where they are alleged by way of inducement" (*a*). [*Bayley*, J. That is unnecessary, because both the plaintiff and the defendants claim under Lord *Dormer*. *Holroyd*, J. The defendants claim title under Lord *Dormer;* therefore they are estopped from impugning his acts.] That would be so, if both parties claimed under the same instrument; but they do not: the plaintiff claims under the lease; the defendants under the elegit. [*Bayley*, J. They both claim under Lord *Dormer*'s life estate. It appears, upon the defendants' inquisition, that Lord *Dormer* was seised for life.] Still it does not necessarily follow that both claim under the *same* life estate. The life estate under which the plaintiff claims may by some means have been determined, and a subsequent life estate may have been created, under which the defendants claim. [*Bayley*, J. Then the defendants ought to have taken issue upon the fact of Lord *Dormer*'s seisin for life, as averred in the replication.] Secondly, the replication does not answer the matters alleged in the plea. The plea sets up a judgment recovered against *John E. P.* Lord *Dormer;* the replication states a demise by indenture by *E. P.* Lord *Dormer*, and does not shew that the Lord *Dormer* mentioned in the plea is the same as that mentioned in the lease. It avers, indeed, that the lease was made by the *said* Lord *Dormer;* that is, by the Lord

(*a*) Co. Litt. 303 b.

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Dormer mentioned in the plea, and that is *John E. P.* Lord *Dormer*, not *E. P.* Lord *Dormer*. The lease appears upon oyer to have been made by *E. P.* Lord *Dormer*, and therefore is no bar to the defendants, because they claim under *John E. P.* Lord *Dormer*. If an action had been brought upon the lease against *John E. P.* Lord *Dormer*, he might well have pleaded *non est factum*. *Field* v. *Winlow* (*a*), *Panton* v. *Chowles* (*b*), *Watkins* v. *Oliver* (*c*), and *Maby* v. *Shepherd* (*d*), are all authorities for that position; and, in a much later case of *Evans* v. *King* (*e*), *Willes*, C. J., after stating those and some other decisions of a like kind, says, "Whatever might be my own opinion if this were a new point, I think I am obliged by these authorities." But even assuming that the grantor of the lease was in fact the same person as the defendant in the action in which the judgment was recovered, still the replication does not aver that he was known as well by one name as by the other; which it was at all events necessary to do in order to obviate this objection. *Cole* v. *Hindson* (*f*), *Scott* v. *Soans* (*g*), *Shadgett* v. *Clipson* (*h*), *Evans* v. *King* (*i*). Thirdly, the replication does not shew, as it clearly ought to have done, that the lease gave the plaintiff a right of possession. The lease, as set out upon oyer, gives the plaintiff a right in reversion only; for it is a lease for years, if Lord *Dormer* should so long live. The action is brought, not against a mere wrong doer, but against a creditor by judgment and elegit; therefore the plaintiff was bound to shew title: but the lease set out in the replication gives him no title to the possession of the premises, because it is a lease in reversion, passing no present interest. The replication confesses all the facts alleged in the plea, and seeks to avoid them; but it fails to do so, and is bad accordingly.

(*a*) Cro. Eliz. 897.
(*b*) Sir F. Moor, 897.
(*c*) Cro. Jac. 558.
(*d*) Cro. Jac. 640.
(*e*) Willes, 554, 557.
(*f*) 6 T. R. 234.
(*g*) 3 East, 111.
(*h*) 8 East, 328.
(*i*) Willes, 554. And see the note to *Field* v. *Winlow*, Cro. Eliz. 897; and *Reeves* v. *Slater*, *ante*, i. 265, 7 B. & C. 486.

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Platt, contrà. The defendants' plea is bad; therefore the whole of the argument with respect to the replication falls to the ground. The defendants were bound, in answer to this action, to have proved Lord *Dormer*'s seisin, and should, therefore, have averred that substantively in their plea; which they have not done. All that they have pleaded might have been given in evidence under the general issue. The plaintiff was in possession; and that is a sufficient title as against a wrong-doer. (Here the Court stopped him.)

BAYLEY, J.—I am of opinion that upon these pleadings there must be judgment for the plaintiff. Actual possession is sufficient to entitle a man to maintain trespass against a wrong-doer. This is an action of trespass, brought by a party in possession, for an alleged injury done to his possession. The defendants, by their plea, say that they are not wrong-doers, because they had recovered a judgment against *John E. P.* Lord *Dormer*, and sued out an elegit thereon, by virtue of which an inquisition was held, by which it was found that at the time when the judgment was recovered Lord *Dormer* was seised of the lands in question for life, and that the sheriff, in consequence, delivered those lands to the defendants. Now, in order to give themselves title as against the plaintiff, whom they, by their demurrer, admit to have been in possession, the defendants were bound to shew that Lord *Dormer* had some title to the lands in question, at the time when they sued out their elegit. The inquisition, as set out in the plea, finds that Lord *Dormer* was then seised for life. Assuming that to be a sufficient allegation that he was so seised, (which, however, I think it is not, though I do not consider it necessary to decide that point,) the question is, whether the replication confesses and avoids the matters alleged in the plea. It states that Lord *Dormer* being seised for life, before the judgment recovered, demised the lands in question to the plaintiff, and that he entered and

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became possessed, and continued so possessed until expelled by the defendants. Both parties, therefore, claim title under Lord *Dormer;* the plaintiff, by virtue of a deed executed in 1820; the defendants, by virtue of a judgment recovered, and an elegit sued out in 1823; so that the plaintiff's title is prior to that of the defendants, Lord *Dormer*'s interest having been transferred by the lease. But, it is said, the lease set out in the replication is not an answer to the plea, because the plea states the judgment to have been recovered against Lord *Dormer* by one Christian name, and the replication shews the lease to have been granted by him in another, and there is no averment of his identity. But the replication alleges that the *said* Lord *Dormer*, being seised for life of the lands, by indenture demised them to the plaintiff, and therefore it does shew, satisfactorily enough as it seems to me, that the Lord *Dormer* who granted the lease, and the Lord *Dormer* against whom the judgment was recovered, are one and the same person. It is not competent to the defendants to take such an objection upon demurrer. Lord *Dormer* may have been sued by a wrong Christian name in the action in which the judgment was recovered, or he may have executed the lease in a wrong Christian name. The lease would not be vacated by reason of the lessor having used a wrong Christian name; it was executed by him, and would be binding upon him. Then, it is said, the plaintiff has made out no title, because the lease, as set out upon oyer, shews by its recitals, that at the time of the demise to the plaintiff, Lord *Dormer* had no interest to demise. The lease recites an indenture made by Lord *Dormer* in June, 1819, whereby he granted an annuity of 1725*l.* for ninety-nine years, charged upon the lands in question, and demised those lands for 100 years to *Dewes*. It further recites that Lord *Dormer* had agreed to sell another annuity of 800*l.* for ninety-nine years, and witnesses that he confirmed the annuity of 1725*l.*, and, subject thereto, charged the lands in question with the annuity

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of 800*l.*, and for better securing the payment of that annuity, demised those lands to the plaintiff for 200 years. The demise to the plaintiff, therefore, was subject to the right of *Dawes;* but *Dawes* was not bound to enter; and if he did not enter, the plaintiff had a good title against all the rest of the world. The demise to the plaintiff was to commence from the day next before the date of the indenture, and it is to be presumed from that, that *Dawes* had not entered at that time. It is, however, sufficient for the purposes of this case to say, that the lease set out upon oyer destroys all title in the defendants, because they claim under a judgment recovered against Lord *Dormer* in 1823, at which time he had no interest in the lands in question. The defendants, therefore, were wrong-doers, and the plaintiff, having the actual possession, is entitled to maintain this action against them, for the trespass committed upon his possession.

Judgment for the plaintiff.

GIBBS *v.* STEAD and REED.

TRESPASS, for breaking and entering plaintiff's dwelling house, and seizing his goods. Plea, not guilty, and issue thereon. At the trial, before *Doyley*, Serjt., at the last Surrey Assizes, the case was this:—The plaintiff was a ship-broker, residing at West-square, in the parish of Lambeth. The defendant *Stead* was collector of the assessed and land taxes for the South Division of the parish of St. George, Southwark. The defendant *Reed* was a broker. On the 22d of March, 1827, the two defendants called at the plaintiff's house, in his absence, and demanded payment of 2*l.* 11*s.* for two quarter's taxes, being 1*l.* 17*s.*

Under 38 *G.* 3. c. 5, ss. 2 & 12, land-tax for the quarter ending 25th March, is due, and may be demanded, and, upon default in payment, distrained for, at any period during that quarter.

Under 38 *G.* 3, c. 5, ss. 9 & 17, and 43 *G.* 3, c. 99, s. 33, where payment of land or assessed taxes is demanded upon the premises, in the absence of the owner, mere non-payment, without notice of the demand, is not a neglect or refusal to pay, to justify an immediate distress: a reasonable interval must be allowed between the demand and the seizure.

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for assessed taxes, and 14*s.* for land tax. They were told by a female servant that the plaintiff was from home, but they entered the house, took an inventory of the goods, and went away, leaving a man in possession. Service of notice of action upon the defendant *Stead* could not be proved, and as against him, therefore, the action was abandoned. On the part of the other defendant, a warrant of the commissioners of taxes for the borough of Southwark was put in, by which *Stead*, as collector of the land tax, was authorized to levy the land tax by four equal quarterly payments; the first quarterly payment on or before the 24th of June next ensuing; the second, on or before the 29th of September; the third, on or before the 25th of December; and the fourth, on or before the 25th of March, 1827. Two points were made on behalf of the plaintiff: —First, that the land tax for the quarter ending on the 25th of March, 1827, could not be legally due until that day, and that the distress for that quarter's land tax having been made before that day, namely, on the 22d of March, was illegal; secondly, that under the 38 *Geo.* 3, c. 5, ss. 2, 9, 12, and 17, and the 43 *Geo.* 3, c. 99, s. 33, relating to the assessed and land taxes (*a*), there was no authority to dis-

(*a*) The 38 *G.* 3, c. 5, s. 2, enacts, "that the sum of £1,989,673 : 7*s.* 10½*d.* shall be raised, levied, and paid to his Majesty within the space of one year from the 25th of March, 1798, and shall be assessed in the several counties, &c. of England, Wales, and Berwick-upon-Tweed, according to the proportions therein mentioned."

Sect. 9 enacts, that the persons appointed by this act to be collectors, "shall levy and collect all and every the rates and taxes so assessed and charged, according to the intent and direction of this act; which said collectors are hereby required to demand all and every the sum and sums of money which shall be so taxed and assessed, of the parties themselves, as the same shall become due, if they can be found, or else at the place of their last abode, or upon the premises charged with the assessment; and the said collectors shall collect and levy the said monies so charged for his Majesty's use, and are hereby required and enjoined to pay unto the receivers-general, or their deputies, all and every the said rates and assessments by them respectively collected and received, at such time or times, place or places, as the said commissioners, or any two

train for either of those taxes, until after a demand, and a neglect or refusal of payment, and that there was no evidence of a regular demand, or of a neglect or refusal of payment, the plaintiff being from home when the demand was made, and a reasonable time not being allowed between the demand and the distress to enable him to make payment. Upon the first point the learned Serjeant entertained considerable doubt whether the land tax was due at the time of the distress, and whether the distress in consequence was legal. He was, however, decidedly

or more of them, shall appoint; so as the whole sums due for each quarterly payment shall be paid or answered by the said collectors to the receivers-general, or their deputies respectively, upon the days and at the times by this act appointed for payment thereof."

Sect. 12 enacts, that the sum of £497,418 : 6*s.* 11*d.* and 9-16th parts of a penny, for the first quarterly payment of the said assessments, shall be levied and paid unto the receivers-general of the said several counties, &c., on or before the 24th of June, 1798; the like sum for the second quarterly payment, on or before the 29th of September, 1798; the like sum for the third quarterly payment, on or before the 25th of December, 1798; and the like sum for the last of the said quarterly payments on or before the 25th of March, 1799.

And sect. 17, after reciting that doubts had arisen touching the authority of collectors to distrain for non-payment of the land tax, under the warrants usually granted by commissioners at the time of their appointments, enacts, "that if any person shall *refuse or neglect* to pay any sum or sums of money, whereat he or she shall be rated or assessed by this act, upon demand by the said collector or collectors of that place according to the precepts or estreats to him or them delivered by the said commissioners; that then, and in all and every such case and cases, it shall be lawful for the said collectors, or any of them, and they are hereby authorized and required to levy the sum assessed by distress and sale of the goods and chattels of such person so *neglecting or refusing* to pay, or distrain upon the messuages, lands, tenements, and premises, so charged with any such sum or sums of money, without any further authority from the said commissioners for that purpose."

The 43 *G.* 3, c. 99, s. 33, enacts, "that if any person or persons shall *refuse* to pay the several sum and sums charged upon him, her, or them, by any act or acts granting the duties herein mentioned, or any other duties to be assessed under the regulations of this act, upon demand made by the collector or collectors of the division or place, according to the precepts or estreats to him or them delivered by such commissioners, it shall be lawful for such collectors, who are hereby respectively thereunto authorized and required, for non-payment thereof, to distrain upon the messuages, lands, &c."

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of opinion, upon the second point, that the distress was illegal for want of a proper demand and refusal; for as the defendants had not allowed any interval of time after the demand of the taxes for the plaintiff to pay them, there could be no neglect or refusal by the plaintiff to pay them before the distress was made. The jury, therefore, under the learned Serjeant's direction, found a verdict for the plaintiff against the defendant *Reed*, and liberty was reserved for him to move to enter a nonsuit. In Easter term last, a rule *nisi* having been obtained accordingly,

Brodrick now shewed cause. The distress was illegal upon both the grounds taken at the trial. First, the land tax for the quarter ending on the 25th of March was not due on the 22d of March, when the distress was made. By the Commissioners' warrant the defendants were authorized to levy that quarter's land tax on or before the 25th of March, and that warrant was founded on the statute 38 *Geo.* 3, c. 5, by s. 12 of which that quarterly payment is directed to be levied and paid over on or before the 25th of March. But that statute does not give any authority to distrain before the 25th of March, and the reasonable construction of it seems to be that the money is not due before, and cannot be distrained for until after, that day; for it would be impossible else to draw the line: and if payment can be enforced one day before the end of the current quarter, it may equally be enforced one day after the expiration of the last preceding quarter, which would be at once absurd and unjust. But, secondly, assuming that the land tax was due at the time the distress was made, the distress was nevertheless illegal, because the defendants had no authority to distrain for that tax under the 38 *Geo.* 3, c. 5, or for the assessed taxes under the 43 *Geo.* 3, c. 99, until there had been a proper demand by them, and a neglect or refusal by the plaintiff, of payment. Here there was no proper demand of payment. A collector going with a broker to a house, in the absence of the proprietor, demanding pay-

ment from a female servant, and immediately taking an inventory of the goods, and putting a man in possession, cannot be said to have made the reasonable demand contemplated by the legislature. Neither was there any neglect or refusal to pay by the plaintiff. The demand was followed instantaneously by the distress; they were both made *uno flatu;* so that there could not by possibility be any neglect or refusal to pay by the plaintiff; for the mere non-payment by the servant, in the absence of her master, cannot be considered as his act.

Hutchinson, contrà. First, the entire sum for which the defendants distrained was due on the 22d of March, the date of the distress. This is evident upon examination of the provisions of the 38 *Geo.* 3, c. 5. By the second section the entire sum therein mentioned is to be raised, levied, and paid over, within the space of one year from the 25th of March, 1798. By the ninth section the collectors are to levy and collect all the taxes assessed and charged, and to demand all the sums so taxed and assessed of the parties themselves, if they can be found, or else at the place of their last abode, or upon the premises charged; and are to pay to the receivers-general all the rates and assessments by them received at such times as the commissioners shall appoint; so as the whole sums due for each quarterly payment shall be *paid by the collectors to the receivers-general* upon the days by the act appointed. And by the twelfth section the sum for the last quarterly payment is to be *levied and paid to the receivers-general, on or before the 25th of March,* 1799. Now as the money is to be paid to the receiver-general *by the collector,* for that is clearly the meaning, on or before the 25th of March, it follows necessarily that the collector must have authority to collect the rates before that day. Secondly, there was a sufficient demand of the money by the defendants, and a neglect or refusal to pay it by the plaintiff. The warrant authorized the defendants to levy the money; and they have merely acted in obedience to the warrant. By the seven-

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teenth section of the 38 *Geo.* 3, c. 5, if any person shall neglect or refuse to pay any sum whereat he shall be rated, upon demand by the collector, the collector is required to levy the sum assessed by distress; and the ninth section had previously authorized a demand, either on the party, or, if he cannot be found, at his last place of abode, or upon the premises charged. Here the defendants went to the plaintiff's house; he could not be found; and they made a demand on his servant, on the premises charged. That was a sufficient demand. And the money not being forthwith paid, that was a neglect or refusal to pay. A party liable to pay taxes is bound to recollect when they become due, and to leave in his house, in his absence, a sum sufficient to pay them whenever they are demanded.

BAYLEY, J.—Upon the last point, the only one decided at the trial, I think the direction of the learned Serjeant was right, and the verdict sustainable, and therefore that the rule for entering a nonsuit ought to be discharged. I have no doubt, upon the construction of the act of parliament, that the land tax assessment for the quarter ending on the 25th of March ought to be considered as due at any period of that current quarter, and that where there has been a proper demand of payment, and a neglect or refusal to pay, the amount may be distrained for before the termination of the quarter. The collector is bound to pay over to the receiver-general the whole amount of the quarter's assessment on the 25th of March, which it is impossible for him to do, unless he has power to collect the money due in respect of that quarter, before the arrival of that day. The land tax for the quarter ending on the 25th of March was, therefore, due on the 22d, when the distress was made, and there is no objection to the distress on the ground that the sum distrained for was not yet due. But I am clearly of opinion that the distress in this case was illegal, because, as the demand was not made personally on the individual liable to pay, there ought to have been an

interval allowed between the demand and the seizure, in order to give the plaintiff the opportunity of paying the sum demanded. The land tax act, 38 *Geo.* 3, c. 5, requires the collectors to demand the sums assessed of the parties themselves as they become due, if they can be found, or else at the place of their last abode, or upon the premises charged with the assessment. If the demand be made, not of the party himself, but upon the premises charged with the assessment, there certainly ought to be a reasonable interval of time between the demand and the seizure, to enable the party to prevent the seizure by complying with the demand and paying the money. Here, the collector goes to the plaintiff's house in his absence, demands payment of the tax of his servant, and upon its not being then paid, instantly makes a distress. It is true that the seventeenth section authorizes the collector to distrain in case of neglect or refusal to pay the assessment *on demand;* but the demand there mentioned must be such a demand as is required by the ninth section, namely, a demand either on the party himself, or at his last place of abode, or upon the premises charged: and where the demand is made upon the premises charged, there ought to be such an interval of time between the demand and the seizure, as will give the party an opportunity to pay the sum demanded. To hold that the very instant after a demand made upon the premises in the absence of the owner, a distress may be made, would be a very harsh construction of the statute, and might render it an instrument of great oppression; it would at all events be productive of great inconvenience in many cases, for poor persons, who are obliged to leave their houses during the day in pursuance of their employment, would find their goods seized for taxes on their return at night. Then as to the assessed taxes. By the 43 *Geo.* 3, c. 99, s. 33, if any person shall refuse to pay the sums charged upon him upon demand made by the collector, it shall be lawful for the collector to distrain. In order, therefore, to justify a distress under that statute, there must be a pre-

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vious demand of payment by the collector, and refusal to pay by the party. But I am clearly of opinion that there was no refusal to pay by the plaintiff in this case. To constitute a refusal to pay, there must be a notice of the demand to the party. If the defendants in this case had waited a reasonable time before they distrained, and the money had not then been paid, that would have been such a neglecting to pay after a demand, as might have been evidence of a refusal within the meaning of this statute. Or, if the plaintiff had been at home when the defendants called for the taxes, and had known of the demand, and neglected to pay; that would have been evidence of a refusal. Or, if the defendants had called one day, and given notice that they would call again for the money on the following day, and the money had not then been forthcoming; that would have been evidence of a refusal. But where, as in this case, a demand is made, not personally on the individual, but at his house, in his absence, and without his knowledge, and no interval of time is allowed after the demand to enable him to receive notice of it, and prepare to comply with it, there I think the mere non-payment is not evidence of a refusal: and if there was no neglect or refusal to pay, the distress was clearly illegal. Upon this ground I am of opinion that the verdict in this case was right, and that the rule for entering a nonsuit ought to be discharged.

HOLROYD, J.—There must be a default in payment by the party upon or after demand made, before the collector is authorized to levy a distress. Here the demand was not made upon the plaintiff himself, but upon the premises charged, and until some default in payment was made by the plaintiff, there was no ground for making the distress. But until notice of the demand had been communicated to the plaintiff, and a reasonable time had been allowed him for complying with it, there could not have been any default by him. Now the plaintiff was from home when the

demand was made; he had no notice of it communicated to him; he had no opportunity of complying with it; therefore he was not guilty of any default. The distress, consequently, was illegal, and the plaintiff is entitled to recover.

LITTLEDALE, J.—I am entirely of the same opinion. I think the land tax was due at the time when the distress was made, and that the collector was authorized to demand payment of it, and, upon refusal, to distrain for it before the end of the current quarter. But, before the collector can be justified in making a distress, there must be default made by the party. Here there was no default made by the plaintiff. The demand was made at his house at a time when he was absent. He ought to have had an opportunity of complying with that demand, and a reasonable interval should have been allowed him for that purpose. If after such an interval he had neglected to pay, that would have amounted to a default; or if he had been at home, and received notice of the demand, and had promised payment at a particular time, and failed in performing that promise, in that case he would have been guilty of a default. But he was not at home when the demand was made; he had no notice that the collector was about to call for the taxes; and he was not bound to leave money in the house sufficient to meet any demand of such a nature that might by possibility be made in the course of the day. I think some reasonable interval of time, varying according to circumstances, ought to be allowed in every case, after the demand made, to make payment, before a distress can legally be levied. Here the distress followed immediately upon the demand, without any such interval, and was therefore, I think, illegal. It follows that this rule ought to be discharged.

Rule discharged.

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The KING *v.* The INHABITANTS of LAWFORD (*a*).

Where a pauper left his father's family at fifteen, and entered the sea service, where he remained till twenty-one:—Held, that he was *then* emancipated, and was settled in the parish where his father was *then* settled.

BY an order of two justices, *Hannah Nunn*, widow, and her three children, were removed from the parish of Lawford, in the county of Essex, to the parish of St. Anne, Limehouse, in the county of Middlesex; and the sessions, on appeal, quashed the order, subject to the opinion of this Court upon the following case.

John Nunn, the son of *John* and *Martha Nunn*, the late husband of the pauper *Hannah Nunn*, was born at Wivenhoe, and in 1812 was married to the pauper *Hannah Nunn*, he being then about twenty-five years of age, and having acquired no settlement in his own right. In 1802, he, being then about fifteen years of age, quitted his parents, and went to sea, where he continued till the period of his marriage, sometimes serving on board a king's cutter, the Argus, and at other times on board different trading vessels, gaining his own living. Up to the age of eighteen, his parents resided at Manningtree, and while there, the vessel on board of which their son was serving being stationed on the river near that town or its neighbourhood, the mother washed for him, and occasional visits were paid by the son to the parents, sometimes of a few days' continuance. During the period from 1805 to 1810, the parents, having quitted Manningtree, removed to St. Anne's, Limehouse, and resided on a tenement of the value of twelve guineas a year; and twice during those five years the son visited them there, and stayed eight or ten days at a time, returning to his ship after each visit. The distance prevented the mother from continuing to wash for the son while she and her husband were resident at St. Anne's, Limehouse; but she occasionally sent him small sums for pocket-money. The son attained the age of twenty-one while his parents were residing at St. Anne's, Limehouse.

(*a*) This case was decided at the Sittings in Banc after last term, but was postponed in consequence of the MS. being mislaid.

In 1810 the parents quitted that parish, and took a tenement of 24*l.* a year at Gravesend, on which they resided when the son married, having been in the occupation of it upwards of a year before such marriage.

Knox and *Brodrick*, in support of the order of sessions. Since the decision in the recent case of *Rex* v. *Lytchet Matravers* (*a*), it may be too late to contend that an emancipation resulting from the child's continued absence from the father's house down to the period of his coming of age, commences by relation from the date of the original separation during his minority, and not from the date of his attaining his majority. But that decision proceeded upon the doctrine of relation only, and not upon a general review of the principle of emancipation; and, therefore, though it may be conclusive against a settlement in Manningtree, which depends on relation, it cannot affect a settlement in Gravesend, proof of which would support this order of removal. The general rule of law is, that the settlement of the child shifts with that of the father, until the child has acquired a settlement of his own; the exception is, that it ceases so to shift, if by marrying at any period, or by other circumstances after he is of age, the child becomes placed in a situation wholly inconsistent with his being a member of his father's family (*b*). The mere fact of his coming of age has never been deemed one of those circumstances, and Lord *Kenyon*, in *Rex* v. *Witton-cum-Twambrookes* (*c*), took occasion to deny that such a conclusion was to be drawn from the expression used by him in *Rex* v. *Roach* (*d*). The real question is, whether the child continues a member of the father's family; and that depends, not upon the mere fact of actual domicile or of age, but upon the continuance of the parental control.

(*a*) *Ante*, i. 25; 7 B & C. 226.
(*b*) See the general rule laid down in *Rex* v. *Wilmington*, 1 D. & R. 140, 5 B. & A. 525.
(*c*) 3 T. R. 355.
(*d*) 6 T. R. 247.

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Rex v. *Hardwicke* (*a*) and *Rex* v. *Cowhoney-borne* (*b*), are in support of that position, because in both those cases the facts were such as raised the presumption of an absolute abandonment of all parental control. There is a distinction between a separation commencing before full age and continuing after it, and a separation commencing only after full age. An adult who separates himself from his father's family, and goes into service, it must be admitted, becomes emancipated (*c*); but the mere fact of a child's attaining his majority during a separation from his father's family, under circumstances which do not wholly exclude the parental control, has never yet been held to constitute emancipation. In *Rex* v. *Haggatt* (*d*) and *Rex* v. *Lytchet Matravers* (*e*), the child was bound out for a term; in the former case as an apprentice, in the latter as a servant; the father, in each case, acquired a new settlement during the minority of the child, and the child, in each case, returned to the father's house after attaining his majority; and it was held, in each case, that the child was not emancipated, because the parental control had still continued, being not incompatible with the control of the master. The same principle had been previously acted upon in *Rex* v. *Uckfield* (*f*), where a child who had been absent from her father's house nearly twenty years, and until after she had attained twenty-one, was held not to be emancipated. In the present case no change took place in the condition of the pauper's husband from the period of his quitting his father's house at the age of fifteen, to the period of his marriage at the age of twenty-five. He was serving as a mariner, on board of different vessels, during the whole of that time; but he occasionally visited his family, and received assistance from them, occasionally, during all the time, and he never did any act which had

(*a*) 5 B. & A. 176.
(*b*) 10 East, 88.
(*c*) See *Rex* v. *New Falcot*, 5 T. R. 478; *Rex* v. *Roach*, 6 T. R. 247.
(*d*) 2 B. & A. 582.
(*e*) *Ante*, i. 25; 7 B. & C. 226.
(*f*) 5 M. & S. 214.

the effect of destroying that degree of parental control which, it has repeatedly been decided, might, and, it is submitted, did in fact, subsist, concurrently and compatibly with that of his different masters. Then, at the time of his marriage his father had acquired a new settlement at Gravesend; consequently that became the place of his own settlement, unless he was emancipated by attaining twenty-one, which, it is confidently submitted, he was not.

Jessopp (with whom was *Mirehouse*), contrà. A child who has separated himself from his father's family during his minority, and continues so separated after he has attained his majority, ceases from the time he becomes of age to be a member of his father's family, and is emancipated. This was clearly laid down in *Rex* v. *Walpole, St. Peter's* (*a*), *Rex* v. *Stanwix* (*b*), and *Rex* v. *Hardwicke* (*c*), and was recognized as law by *Bayley*, J., in *Rex* v. *Lytchet Matravers* (*d*). (Here the Court stopped him.)

BAYLEY, J.—It is extremely desirable in cases of this nature to preserve an uniformity of decision, and to act, wherever it is possible, upon broad and general principles, and not to give effect to such nice and subtle distinctions as have been advanced in the argument in support of this order of sessions. It was laid down, as the rule, by *Lawrence*, J., in *Rex* v. *Roach* (*e*), that if a child leaves his father's family under twenty-one, and returns while he is under age, he continues to be part of that family, and his settlement will shift with that of his father; but that if the child, when he attains twenty-one, is absent from his father's family, the father thereby loses all control over him, he becomes emancipated, and his settlement will not shift with that of his father, but will continue to be in that parish where the father was settled when the child attained twenty-one. That learned judge there says, "In the case

(*a*) Burr, S. C. 638.
(*b*) 5 T. R. 670.
(*c*) 5 B. & A. 176.
(*d*) *Ante*, i. 25; 7 B. & C. 226.
(*e*) 6 T. R. 247.

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of the soldier, the son was enlisted when he was under age, and if he had returned home before he was twenty-one, he would have been considered part of his father's family; or if he had quitted the army before twenty-one, without returning home, the father might have reclaimed him by suing out a habeas corpus; but it appears from the case that he had attained the age of twenty-one before he left the army: therefore during the time that he continued a soldier, his father lost all control over him, he being of age; and the subsequent settlement gained by the father was not communicated to him." After applying the reasoning in that case to the one before the Court, the learned judge adds, "If, after such a service as this, the daughter had returned to her father before she was of age, she would have continued as part of her father's family; but, not returning till after, she can no longer be considered as part of his family." *Rex* v. *Cowhoneyborne* (*a*) was decided upon the same principle. There, a widower, having a daughter, placed her at eleven years of age with an uncle, by whom she was wholly maintained after that time, and with whom she continued to reside after she came of age, doing service for him, but without any contract of hiring to give her a settlement of her own; the father in the meantime having gone out to service. It was held, that on her coming of age she was emancipated. There, at the time she became twenty-one, she continued absent from her father's family. The same doctrine was laid down in *Rex* v. *Hardwicke* (*b*), the only distinction between that and the former cases being, that the original separation of the child from his father's family was not voluntary; he having been drawn for the militia while he was under age, and served in it until he was twenty-three years of age. That distinction, however, does not vary the question of emancipation; and the principle deducible from that latter case is, that a child is not part of his father's

(*a*) 10 East, 88. (*b*) 5 B. & A. 176.

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family while he remains subject to a control paramount to that of his father; and that if, while under age, he contract a relation inconsistent with the parental control, which relation continues until after he attains twenty-one, the authority of the father thereby wholly ceases, and he can no longer insist upon the child's returning into his family; and the child is emancipated. In this case, when the pauper's husband attained twenty-one, his father's settlement was at Limehouse, and he was absent from his father's family, in a service, in which he voluntarily continued after he was twenty-one. The consequence was that he then became emancipated, and that his settlement continued at Limehouse, though his father's had been transferred to Gravesend. The order of sessions, therefore, quashing the order of removal to the former parish, must itself be quashed.

Order of Sessions quashed.

LAING, Gent., one, &c. *v.* STONE.

A bill or note payable on a day certain, carries interest from that day, unless the non-payment has been occasioned by the negligence of the holder.

ASSUMPSIT on a promissory note made in 1826, for 50*l.*, payable three months after date to the assignees of Sawtel, a bankrupt, and by them indorsed to the plaintiff. Plea, *non assumpsit*. The action was commenced in last Hilary term. At the trial before *Gaselee*, J., at the last Spring assizes for the county of Somerset(*a*), the signatures of the defendant and the payee being proved, it was admitted that the principal had been satisfied by payments of small sums, and that the action was brought for the interest. The defendant gave in evidence a memorandum signed by the plaintiff, shortly before the commencement of the action, requiring payment of the principal then remaining due, and offering to give up the note upon the

(*a*) Counsel for the plaintiff, *Moody*; for the defendant, *Merewether*, Serjt, and *Erle*.

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receipt of that sum within a week. Upon this it was contended, on the part of the defendant, that the interest must be taken to have been satisfied to the payee before the indorsement, or that the plaintiff had waived the right to interest, and that it was competent to the jury in their discretion to give or refuse damages by way of interest. The learned Judge told the jury, that the note carried interest after the three months, and that the only point for them to consider was, whether they believed from the memorandum that the interest had been paid. A verdict having been found for the plaintiff,

Merewether, Serjt., in Easter term, obtained a rule *nisi* for a new trial, and he was now called upon to support his rule. The learned Judge should not have told the jury that they were bound to find interest, unless they were satisfied that interest had been paid; and in so doing he invaded the province of the jury. *Du Belloix* v. *Lord Waterpark* (*a*). If it had been left to the jury to say whether they thought that the plaintiff was entitled to recover interest, they must have, without hesitation, found a verdict for the defendant. Though the presumption was strong in *Du Belloix* v. *Lord Waterpark*, the point of law in the two cases is the same. [*Bayley*, J. The interest is no part of the debt, certainly.]

Moody, contrà, referred to *Cameron* v. *Smith* (*b*), but was stopped by the Court.

BAYLEY, J.—I think the direction was right. The non-payment of the note when it became due was the fault of the defendant. The learned Judge was perfectly right in stating that the note carried interest after the three months. A note payable at a particular time carries interest after that time. It would be very inconvenient if it were left to the discretion or rather to the caprice of the jury to say

(*a*) 1 D. & R. 16. (*b*) 2 B. & A. 805.

whether interest should be paid or not. There may be a case of an extraordinary description in which interest might be properly withheld. The case referred to by my brother *Merewether* was of a very peculiar nature. In that case there had been no demand of interest (*a*). The defendant may not have known where the plaintiff was. There was no fault or wrong in the defendant in not paying, but the fault was the plaintiff's, in not being where the defendant could pay him interest. As it would introduce confusion in a case not of an extraordinary nature, to say that this was in the discretion or in the caprice of the jury, it was right to say that the note carried interest after the three months.

HOLROYD, J.—The memorandum produced went to shew that the principal had been paid, and not the interest.

LITTLEDALE, J.—What the learned Judge said to the jury seems to me to be perfectly correct.

BAYLEY, J.—In *Du Belloix* v. *Lord Waterpark*, during part of the time, the plaintiff was an alien enemy, and the jury might see no wrong or fault in the defendant. The true ground of decision in *Cameron* v. *Smith* was, that there must be a default in the holder to deprive him of his right to interest.

Rule discharged.

(*a*) It was proved at the trial that the plaintiff had applied to the defendant, after the peace, for the payment of principal and interest; though that fact does not appear in the report. The action was brought for the benefit of the Marquis du Belloix's creditors.

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BAILEY, surviving Assignee of HALLIWELL, a Bankrupt, *v.* CULVERWELL, BROOKS, and CARROLL.

A., as broker for *B.*, sells goods which are in *A.*'s custody to *C.*, to be paid for by the acceptance of *D.* Upon the insolvency of *D.* *A.* obtains from *C.* an order to sell the goods, and apply the proceeds to meet the acceptance. *C.* becomes bankrupt. *A.* delivers the goods to *B.*, who subsequently returns them to *A.*, after which they are demanded by the assignees of *C.* The jury, or the Court upon a special case, may infer the adoption by *B.* of the act of *A.* in obtaining the order; and neither the delivery of the goods to *B.*, nor the refusal to deliver them to the assignees, amounts to a conversion.

TROVER for beaver skins. Plea, not guilty. At the trial before Lord *Tenterden*, C. J., at the sittings at Guildhall after Hilary term, 1827 (*a*), a verdict was found for the plaintiff, damages 1000*l.*, subject to the opinion of the Court upon the following case:

The defendant *Carroll*, in December, 1823, sold a quantity of beaver skins, by a contract in writing, to the bankrupt, through the agency of the other defendants, *Culverwell* and *Brooks*, brokers, who had the skins in their possession, for 427*l.* 5*s.* 6*d.* to be paid for by the bankrupt's bill on *Walducks* and *Hancock*, payable at four months after date. The bankrupt's bill on *Walducks* and *Hancock* was sent to the defendants, *Culverwell* and *Brooks*, according to the terms of the contract, inclosed in a letter, of which the following is a copy:

"Gentlemen,—Inclosed you will find a bill accepted by *Walducks* and Co. for 429*l.* 13*s.* 4*d.* to balance for the bearer, and if you can obtain 2*s.* per pound profit, sell them; at present let them remain with you on that principle.

Jan. 14, 1824. (Signed) "*William Halliwell.*"

The bill was immediately handed over by the defendants, *Culverwell* and *Brooks*, to the defendant *Carroll*. In consequence of the above letter the goods remained with the brokers for sale. On the 16th of March, before the bill became due, *Walducks* and Co., the acceptors of the bill, stopped payment, and the defendant *Culverwell*, in consequence thereof, applied to the bankrupt for a further security, when he obtained from him the following letter:

"Messrs. *Culverwell* and *Brooks*,—Please to sell the beaver you hold of mine, and take the proceeds to pay my bill on *Walducks* and *Hancock*; any profit arising from it pay over to me. Yours, &c.

March 16. *William Halliwell.*"

(*a*) Counsel for the plaintiff, *Scarlett* and *Parke*; for the defendant, *Murryat* and *F. Pollock*.

The goods were not sold in pursuance of this letter, but remained with the defendants *Culverwell* and *Brooks*, until they were delivered under an order of the defendant *Carroll*, as after mentioned. The bill of exchange was dishonoured on arriving at maturity, and notice thereof was duly given to the bankrupt on the 17th of May; and the defendant *Culverwell*, when examined before the commissioners, stated, that on the 17th day of May the goods were attached at the suit of *Edward Carroll*, by process out of the Court of the Lord Mayor of the city of London (*a*).

A commission of bankrupt issued against *W. Halliwell* on the 4th of June, 1824, which was opened on the 11th of June, on an act of bankruptcy committed on the 21st of May preceding, and the plaintiff and one *Richard Emett*, (who died since the commencement of this action,) were duly chosen assignees, and the usual assignment made to them by the commissioners, previous to the making of the demand hereinafter mentioned. On the 14th of July, 1824, the defendant *Carroll* gave an order to the other defendants to deliver the skins to a porter, who brought the order on his account, which was accordingly done. On the 5th of November, 1824, *Carroll* gave an order to the other

(*a*) Upon a *concessit solvere*, (1 Wms. Saund. 68,) *Carroll* v. *Halliwell*, for 1000*l*., filed 17th May, 1824. Oath for 429*l*. 13*s*. 4*d*. Process of summons against *Halliwell*; return, *nihil*; suggestion of goods of *Halliwell* in the hands of *Culverwell* and *Brooks*; attachment; return of *attachiari feci*; return of four defaults by *Halliwell*; award of garnishment against *Culverwell* and *Brooks*, to shew cause why *Carroll* should not have judgment of appraisement of the goods attached; return of garnishment; non appearance of garnishees; judgment (2 July, 1824.) "Therefore it is considered by the Court that an appraisement be made of their goods and chattels," &c. "Inventory and appraisement had and taken the 12th day of July, 1824, of divers goods and chattels lately attached in the Lord Mayor's Court, London, as the proper goods and chattels of *William Halliwell*, defendant, at the suit of *Edward Carroll*, plaintiff, in the hands and custody of *James Culverwell* and *Thomas Brooks*, garnishees; that is to say, 424 beaver skins, which we value and appraise at the sum of 400*l*.—(Signed) *J. Wontner*, citizen and feltmaker. *George Moxon*, citizen and fishmonger."

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defendants to receive back the skins, and such defendants, on the same day, received them again into their possession, where they remained until after the trial. On the 15th of November, 1824, the plaintiff and his late co-assignee caused a demand of the skins to be made upon the defendants *Culverwell* and *Brooks*, and at the same time offered to pay the charges for warehousing the same, when the said defendants referred the plaintiff and his said co-assignee to their attorneys, and refused to deliver them up. It was agreed on the trial that the skins should be sold, and they have since been sold for 311*l.* 14*s.* The question for the opinion of the Court is, whether the plaintiff is entitled to recover, and, if he is, whether the full value of the skins, or nominal damages only.

Parke, for the plaintiffs. First, the plaintiff is entitled to recover the full value of these skins, which remained as the property of *Halliwell*, in the hands of *Culverwell* and Co. at the time they were wrongfully delivered by the *latter* to *Carroll*, the defendant, who had no lien or interest. The order given by *Halliwell* on the 14th of March was not obtained from him at the request of *Carroll*, nor was it ever communicated to *Carroll* before the bankruptcy of *Halliwell*, which therefore operated as a revocation. *Scott* v. *Porcher* (*a*), *Williams* v. *Everett* (*b*), *Yates* v. *Bell* (*c*). Upon the delivering over of *Walducks* and Co.'s acceptance to *Carroll*, *Culverwell* and *Brooks* ceased to be his agents, and became the agents of *Halliwell*, for whom they held the goods, and at whose wish these goods from thenceforward stood in *Culverwell* and *Brooks*'s warehouse (*d*). Any

(*a*) 3 Meriv. 652.

(*b*) 14 East, 592.

(*c*) 3 B. & A. 643.

(*d*) By the civil law, though a delivery, either actual or constructive, is necessary to change the property, yet the contract of sale alone is sufficient to fix the vendor with the risk of the destruction or injury of the thing sold. "It is an established rule," says *Pothier*, (*Traité du Contrat de Vente*, No. 307,) "that as soon as the contract of sale is complete, the thing sold is at the risk of the purchaser, even before delivery; so that if,

agency which *Culverwell* and *Brooks* may be supposed to have assumed for the benefit of *Carroll*, was repudiated by

during this interval, it perish without the fault of the vendor, the vendor is discharged, whilst the purchaser is nevertheless still bound to pay the stipulated price. The discharge of the vendor under these circumstances, from his obligation to deliver, depends upon another principle, namely, that every obligation *certi corporis* is discharged when the thing itself ceases to exist. This principle arises from the nature of the contract itself. The thing to be delivered being the subject of the obligation, it is obvious that when the former ceases to exist, the obligation itself must be at an end." And see D. 18, 1, 25, 1.

The rules of the civil law are quite clear on these points, (D. 18, 1, 19,) and are, it would seem, to be considered not as positive regulations, but as necessary deductions from the nature of the contract *emptio-venditio*, and therefore co-extensive in their obligation with civil society itself. To use the language adopted by Lord *Mansfield* on a somewhat similar occasion (2 Burr. 887,) "non erit alia lex Romæ, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes et omni tempore, una eademque lex obtinebit." "If the vendor be fully competent to dispose of the thing sold, whether as principal or as agent, the effect of delivery is to pass the property in the thing sold to the purchaser, provided the purchase-money be paid or the vendor choose to give credit. The contract of sale cannot of itself produce this effect. Contracts can form only personal engagements between the contractors. A delivery made in pursuance of the contract can alone transfer the property. It follows that if the proprietor, after selling an article to *A.* without delivering it, should be so dishonest as to sell and deliver it to *B.*, a subsequent *bonâ fide* purchaser, the property would be transferred to *B.* *A.* would only have a personal action against the vendor for his damages and loss resulting from the non-execution of the contract, and would have no right in the property as against *B.* He has neither *jus ad rem* nor *jus in re*. Another consequence of this principle is, that the creditors of the vendor may, before delivery, seize the property, even where the price has been paid; and the purchaser in this case has only an action against his vendor." *Pothier*, *Traité du Contrat de Vente*, Nos. 318, 319, 320.

The modern rule, that the property passes by the bargain without either payment or delivery, appears to be an anomaly, arising not from the intentional setting up of a new standard of decision, but from its being assumed, without examination, that the *risk* was inseparably attached to the *property*. And the consequence seems to have been, that those cases which, in the opinion of the civilians, fixed the purchaser with the risk, have, *for no other reason*, been treated during the last thirty years, as proving that the property was already changed, although in the very passages relied on, the framers of the

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the act of *Carroll* himself, in attaching these skins in their hands as the property of *Halliwell*. Secondly, the plaintiff is entitled to nominal damages, even if the Court should be of opinion that he cannot recover the full value. By the order of the 16th of March, *Halliwell* directed *Culverwell* and *Brooks* to sell the beaver, instead of which they handed it over to *Carroll*, which amounted to a conversion by all the defendants. *Solly* v. *Rathbone* (*a*).

F. Pollock, contrà, was stopped by the Court.

BAYLEY, J.—The skins were sold at credit, and they remained in the possession of the brokers, by the direction of the purchaser. The property in these goods then vested in the purchaser, and the brokers held them as his agents. The acceptance which had been given for the price of these goods afterwards turned out to be bad, and one of the brokers *(Culverwell)* applied to the purchaser for further security. That application must be taken to have been made on the behalf of *Carroll* the vendor, for whom he had sold the goods and obtained the acceptance. No prior authority for making this application was shewn, but it has been long settled that the adoption of an act done by a person assuming the character of agent, has relation to the time at which the act was done (*b*). We must presume that *Carroll* would adopt an act by which he might be

Digest were considering the liability of the purchaser *previous to the change of property.*

In an action for breaking a close, and taking wheat which defendant had bought but had not paid for, the question was, whether in the defendant's plea, stating the purchase, he ought to have averred payment. *Bryan* said that it was necessary, because though the property passed by the bargain, a special property remained in the vendor, like that of lessor of sheep. *Littleton*, J. "I can never admit that the property is in him who purchases verbally without payment; for it is not an absolute bargain, but upon a condition in law, namely, that if he pay it shall be good, if not it shall be void." P. 17, E. 4, fo. 1 and 2, pl. 2. *S. C.* cited, and *S. P.* Plowden, 11 b.

(*a*) 2 M. & S. 298.

(*b*) *Vide* 3 B. & A. 689. 692.

benefited, and from which he could derive no prejudice. In *Scott* v. *Porcher* (*a*), the order rested in a communication between the principal and the agent. Here the communication is between the vendor's agent and the purchaser. It has been urged, that while the goods were in the brokers' warehouse they remained there at the risk of the purchaser. But in every case of a lien the goods are at the risk of the owner, and not of the party claiming the lien. The proceedings of the Lord Mayor's Court cannot be considered as a repudiation by the vendor of the agency of the brokers, in obtaining the order of the 16th of March. *Carroll* was not entitled to the possession of the goods, but they were restored to the proper custody before the assignees interfered.

LITTLEDALE, J.—I am of the same opinion. Upon the first point I think, that *Culverwell* having sold the goods and received the acceptance for *Carroll*, the Court may infer that the former, in applying for further security, was also acting in the character of agent to the latter, though that fact is not expressly stated in the special case. *Carroll*, who was endeavouring to secure himself by a foreign attachment, would not be likely to repudiate an act, by adopting which he was to obtain better security. Then with respect to the second part, in *Solly* v. *Rathbone* the goods were actually sold by the defendants, to whom they had been improperly delivered. Here they were returned to the proper custody before the demand was made.

Rule absolute (*b*).

(*a*) 3 Meriv. 652, *ante*, 566.

(*b*) And see *Bloxam* v. *Sanders*, 7 D. & R. 396, 4 B. & C. 941; *Studdy* v. *Sanders*, 8 D. & R. 493, 5 B. & C. 629; *Simmons* v. *Swift*, 8 D. & R. 693, 5 B. & C. 857.

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BROOKE *v.* NOAKES.

To support an action on 11 *G.* 2, c. 19, s. 3, for assisting a tenant in fraudulently removing his goods, with intent to prevent a distress, the defendant must be privy to the fraudulent intent, and must actually assist in the removal.

DEBT upon the statute 11 *G.* 2, c. 19, s. 3, for penalties. The declaration stated that one *Meers* was tenant to plaintiff of certain premises from year to year, at a yearly rent; that rent was in arrear; that *Meers* fraudulently carried away certain cattle, goods and chattels, which were upon the premises, with intent to prevent plaintiff from distraining the same for the rent in arrear; that defendant unlawfully and knowingly aided and assisted *Meers* in such fraudulent carrying away of such cattle, &c., with intent to prevent the same from being distrained for the rent in arrear, contrary to the statute; and that such cattle, &c., were of the value of 1000*l.*, whereby an action had accrued to plaintiff to demand from defendant 2000*l.*, being double the value of such cattle, &c. Plea, *nil debet;* and issue thereon. At the trial before *Burrough*, J., at the last Kent assizes (*a*), it appeared that *Meers* was tenant to the plaintiff of the premises described in the declaration; that in August, 1826, arrears of rent were due from *Meers* to the plaintiff; and that *Meers* then had on the premises five cows, which his wife usually milked, and 200 sheep; that on the 2d of September, being Saturday, the plaintiff called upon *Meers*, and made pressing applications for payment of the rent, when *Meers* said that the defendant, who lived about two miles off, would take his stock at a valuation; that on the following day, Sunday, the stock and goods of *Meers* were removed from his premises, the cows being driven away by one *Rickwood*, who was brother-in-law to the defendant, and resided with him; that previously to the removal the sheep were marked *G. M.*, but that when found on the defendant's premises they were marked *T. N.*; and that a few days after the removal *Meers*'s wife was seen milking the cows on the defendant's premises. The learned Judge told the Jury, that although there was clear evidence

(*a*) Counsel for the plaintiff, *Marryat*, *Bolland*, and *C. Law;* for the defendant, *Thesiger*.

that *Meers* had fraudulently removed his stock, for the purpose of preventing his landlord from distraining them, still that was not sufficient to support this action, unless they were satisfied by equally clear evidence that the defendant had aided and assisted in the removal, with the same intent; that in his opinion there was not such evidence, for there was no proof of any act done by the defendant indicative of such an intent; it was not even proved that he had ever seen the stock upon *Meers*'s premises, or that he had any reason to know that they had been brought to his own premises, for the purpose of preventing their being distrained. The jury found a verdict for the defendant. A rule *nisi* for a new trial having been obtained in Easter term by *Marryat*, on the ground that the verdict was against evidence, and upon the authority of *Lister* v. *Brown* (*a*), and *Stanley* v. *Wharton* (*b*),

Thesiger now shewed cause. The statute 11 *G.* 2, c. 19, enacts, by s. 1, "that if any tenant shall fraudulently or clandestinely convey away or carry off the premises his goods, to prevent the landlord from distraining the same for arrears of rent, it shall be lawful for the landlord, within 30 days after such conveying away or carrying off such goods, to distrain;" and by s. 3, "that if any tenant shall fraudulently remove or convey away his goods, or if any person shall wilfully and knowingly assist such tenant in such fraudulent conveying away or carrying off any part of his goods, or in concealing the same, he, the person so offending, shall forfeit and pay to the landlord double the value of the goods by him carried off or concealed." The latter section not only creates a duty which previously did not exist, but also makes the breach of that duty an offence, and visits the offender with the penalty of double the value of the goods removed. The statute, therefore, is highly penal, so far as it regards third persons, although it is remedial so far as it regards the remedy of the landlord

(*a*) 3 D. & R. 501. (*b*) 9 Price, 301; 10 Price, 138.

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against the tenant. Then in a case like this the statute must be construed strictly, and a defendant cannot be fixed with the penalty, except by strict proof that he has committed the offence. The offence with which this defendant is charged, is, the wilfully and knowingly assisting *Meers* in the fraudulent removal of his goods, and in order to make out that charge, the plaintiff ought to have proved, not only that there was a fraudulent removal by *Meers*, that is, a removal with intent to prevent the goods being distrained, but that the defendant assisted in the removal with the same intent; because it has been decided, and indeed is evident from the language of the statute, that the third section is confined in its operation to such cases as fall within the first. *Bach* v. *Meats* (*a*). But in this case there was absolutely nothing to shew that the defendant was privy to the fraudulent intent with which *Meers* removed the goods, and consequently the verdict was perfectly right. The cases which were cited when this rule was obtained, are very different from the present. *Lister* v. *Brown* (*b*) only decided, that in an action against a tenant for fraudulently removing his goods, it is not necessary to shew an actual participation in the act by him, if the removal take place with his privity. The action there was against *Brown* the father, as tenant. The goods were in fact removed by *Brown* the son, who was at the time in possession of the premises, though the father had been tenant, and was liable for the rent in arrear. It was contended that the case was not within the statute, because the removal was not the act of the defendant, but of a third person; but the jury having found that the removal by the son was with the privity of the father, the Court were of opinion that the act of removal by the son must be considered as the act of the father, and therefore that the action was maintainable against the father, as for an actual removal by him. *Stanley* v. *Wharton* (*c*) only decided, that in an action against a

(*a*) 5 M. & S. 200.
(*b*) 3 D. & R. 501.
(*c*) 9 Price, 301; 10 Price, 138.

defendant for assisting a tenant in fraudulently removing his goods, the acts of the tenant are evidence of his own fraud, and of knowledge by the defendant, if by other evidence he is proved to have contributed to it; and that circumstances of suspicion may be laid before the jury to prove a fraudulent co-operation. Here all the evidence which the plaintiff had to offer was laid before the jury, but there was none to satisfy them that the defendant was privy to the fraudulent intent of *Meers* the tenant. Besides, in a penal action like this, the Court will not grant a new trial upon the ground of a supposed balance of evidence against the verdict, where the verdict has been found for the defendant. *Brook* v. *Middleton* (*a*), and *Rex* v. *Mann* (*b*).

Bolland and *C. Law*, contrà. The cases last cited have no application to the present. The one was a criminal prosecution, and the other was an action upon a penal statute. But the 11 *G.* 2, c. 19, is not a penal, but a remedial statute, *Lister* v. *Brown* (*c*), and *Stanley* v. *Wharton* (*d*); as the 29 *Eliz.* c. 4, which subjects a sheriff, who takes larger fees than those allowed by that statute, to an action for treble damages, at the suit of the party grieved, has been held to be a remedial, and not penal statute; *Woodgate* v. *Knatchbull* (*e*). Then, upon the main point, there was abundant evidence in this case to shew that the defendant assisted *Meers* in the fraudulent removal of his goods, and that he did so with the intent to prevent their being distrained by the plaintiff. *Bach* v. *Meats* (*f*), only decided that where there is a *bonâ fide* sale of the goods, the defendant is not within the statute; but here the *bona fides* is the very question in dispute. Then look at the evidence as regards that question. The cattle were removed, on a Sunday, to the defendant's premises—they were driven thither by the defendant's brother-in-law—the cows, while

(*a*) 10 East, 268.
(*b*) 4 M. & S. 337.
(*c*) 3 D. & R. 501.
(*d*) 9 Price, 301; 10 Price, 138.
(*e*) 2 T. R. 154.
(*f*) 5 M. & S. 200.

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there, were milked by the wife of *Meers* the tenant—the sheep were mixed with those of the defendant, and their marks were changed: all these facts combine to shew that the defendant must have been privy to the fraudulent purpose for which the removal took place. [*Bayley*, J.—It was not proved that the defendant ever saw the sheep. What is there in the case to affect the defendant with any knowledge of *Meers*'s fraudulent intention?] There were strongly suspicious circumstances, which it was held in *Stanley* v. *Wharton* (*a*) were proper to be laid before the jury to prove a fraudulent co-operation; and it ought at least to have been left to the jury in this case to say, whether the defendant was privy to the fraud, and concurred in it, or not. [*Bayley*, J.—Surely there should be acts or declarations of the defendant's proved, in order to raise the suspicion of his guilty knowledge. In this case none were proved. I think actual knowledge ought to be proved, and clearly proved. This is in its nature a penal action, and in such a case I shall always protest against the practice of the plaintiff's making out a stinted *primâ facie* case of suspicion, in order to force the defendant to call witnesses in answer.] In *Lister* v. *Brown* (*b*), the Court held that, under circumstances like the present, except that the action there was against the tenant, it was not necessary to prove an actual participation in the fraudulent act; and the Lord Chief Justice there said, "this statute, though it is penal, is also remedial, and must receive a liberal construction. It places those who shall do the illegal act, and those who shall aid and assist, on the same footing; they are all liable to the same consequences as principals." [*Bayley*, J.—I quite agree to that. I admit that the statute ought to be construed liberally; but we are asked to go still further.] The acts of the defendant's brother-in-law and servants must be taken as his own acts; they raised a strong suspicion against him, and threw upon him the burthen of proving that he

(*a*) 9 Price, 301; 10 Price, 138. (*b*) 3 D. & R. 501.

did not authorise them, and that he was not privy to the fraud, to the completion of which they contributed.

BAYLEY, J.—I am of opinion that the verdict found in this case was right. The statute of 11 *G.* 2, c. 19, is remedial; but it is penal also. It is remedial insomuch as it extends the remedy which the landlord previously had against his tenant; but it is so far penal, that the landlord who seek to fix upon a third person the penal consequences of the third section, must bring the case by strict and clear and satisfactory evidence, within the letter and meaning of that enactment. The plaintiff in this case, therefore, ought to have proved, not only that the defendant assisted in the removal of the goods, but that he did so with intent to prevent their being distrained. But there was really no evidence that could have satisfied the jury even that the defendant assisted in the removal of the cattle. If he did so, the fact might have been proved by *Rickwood;* but him the plaintiff did not think proper to call as a witness. Assuming, however, that fact to have been proved, I think the defendant ought not to be visited with the penal consequences of this statute, unless it is clearly and distinctly shewn that he was privy to the frandulent purpose for which the goods were removed. Of that there was no evidence, and upon that ground I think the verdict was properly found for the defendant, and therefore that this rule ought to be discharged.

HOLROYD, J. and LITTLEDALE, J., concurred.

Rule discharged.

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PHILLIPS *v.* ALLAN.

The discharge of an insolvent by *cessio bonorum* in Scotland, is no bar to an action brought by an English creditor in England for a debt contracted there, though the plaintiff opposed the defendant's discharge in Scotland; unless he sought relief from the Scotch law, by claiming a distributive share of the insolvent's property.

ASSUMPSIT by drawer against acceptor of a bill of exchange. The bill was dated *London*, 17th December, 1821, and was payable two months after date. The defendant pleaded, that after the accruing of the causes of action in the declaration mentioned, and before the exhibiting of plaintiff's bill, to wit, on 4th July, 1826, he, defendant, was a prisoner for debt, at the suit of *John Sim*, in a certain prison called the Tolbooth of Canongate, in that part of the united kingdom called Scotland, to wit, at &c.; and being so in prison, he, defendant, afterwards, to wit, on &c., at &c., did present unto the lords of his Majesty's council and session, of that part of the united kingdom called Scotland, a written petition, setting forth that on the 20th May, 1826, he, defendant, was incarcerated in the Tolbooth, by virtue of letters of caption raised at the instance of *John Sim*, and that he, defendant, was thereafter arrested in the Tolbooth, by virtue of letters of caption raised at the instance of certain other persons therein named, and that he, defendant, was continually oppressed, and in danger of being arrested at the instance of other persons thereinafter named, his real or pretended creditors, (naming plaintiff among others,) and also that the inability of him, defendant, to pay his debts, was not occasioned by any fraud (*a*) in him, but was owing to misfortunes and losses sustained by him, as would, if required, be particularly condescended in the course of that process; and although he had made offer to convey his whole effects to his said creditors, yet they refused to accept thereof, or consent to his being set at liberty; and therefore that it ought and should be found and declared by decree of the lords of council and session, that the inability of him, defendant, to pay his debts was not owing to fraud, but to misfortunes, and that it being so found and declared, he, defendant, should be ordained to be set at liberty from the said prison, upon his granting a disposition *omnium bonorum*,

(*a*) *Post*, 588, (*a*).

upon oath, in favour of his creditors, in such form as the lords should direct, and all judges &c., of his Majesty's law should be discharged from putting any diligence into execution against him, and from troubling, molesting or incarcerating him, in time coming, for payment of any debts due by him to the persons named in the petition, and others; and that the said lords of council and session ought to dispense with his, defendant's, wearing the habit (*a*) directed to be worn by bankrupts, by any law or practice, or otherwise, after the form and tenor of the laws and daily practice of Scotland, used and observed in the like cases in all points. Whereupon, afterwards, to wit, on &c., according to the practice of the Court of the lords of council &c., it was ordered that notice should be given to the creditors named in the petition, and to plaintiff among others, to compear before the lords &c., at Edinburgh, or wherever &c. on 20th of June, 1826, to answer, at the instance of defendant, in respect of the matters contained in the petition. That notice was given to the creditors named in the petition, and to plaintiff among others, to compear as aforesaid, whereupon afterwards, to wit, on &c., at &c., the subject-matter of the petition was heard before the lords &c., and certain creditors of defendant, and plaintiff among others, *appeared by counsel, and were heard in opposition to defendant in respect of the petition and the subject-matter thereof*, whereupon it was afterwards adjudged in the said Court, that the lords &c., found defendant entitled to the benefit of the process aforesaid, upon lodging in process a disposition of his effects, and

(*a*) That the green cap which the Roman jurisprudence placed on the head of the insolvent, (to mark the folly of the bearer, Pasquier, Récherches, liv. 4, chap. 18,) was worn in France in the 17th century, may be inferred from the language of the satirist, whose friend Damon (the astronomer Cassandre) is advised to secure his liberty by flight:

Sans attendre qu'ici la Justice ennemie
L'enferme en un cachot le reste de sa vie,
Ou que *d'un bonnet vert le salutaire affront*
Flétrisse les lauriers qui lui couvrent le front.

At a later period (Ferrière, Dictionnaire du Droit, tit. *Bonnet verd*,) it seems to have been sufficient if the insolvent carried the cap with him, ready to put on when he met a creditor. And see Code Napoleon, No. 1265—1270.

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also upon making oath in the terms of the acts of sederunt. Whereupon defendant, afterwards, to wit, on &c., lodged in process a disposition of his effects, and also made oath in the terms of the acts of sederunt, and thereupon became entitled to be and was discharged out of custody. That from the time of his imprisonment to the time of his discharge out of custody, plaintiff had no cause of action against defendant, except the causes of action in the declaration mentioned. That afterwards, to wit, on &c., certain funds, goods, and chattels of defendant, of the value of 100*l.*, became available, and might have been recovered under the said disposition for the benefit of the creditors of defendant, and for the benefit of plaintiff among others: and that all and singular the proceedings aforesaid were pursuant to, and in conformity with, the laws of Scotland aforesaid, and that, according to those laws, the said lords, &c., were competent to act as aforesaid in the premises; whereby, and by the force and effect of the said laws, defendant had become absolutely discharged in respect of his person, lands, goods, and chattels, from the causes of action aforesaid. And this &c. Replication, that the causes of action mentioned in the declaration severally accrued to plaintiff within the kingdom of England. And this &c. Demurrer to the replication, and joinder in demurrer.

Barstow, in support of the demurrer. No case is to be found precisely like the present; it must, therefore, be discussed and decided, in some degree, upon principle rather than upon authority. It may be admitted that the judgment of the Scotch Court is to be considered in all respects as the judgment of a foreign Court; and thus three propositions arise on the part of the defendant. First, that if a contract be made in England, and both parties appear before a foreign Court, in respect of the subject-matter of the contract, that Court may adjudicate upon it. Secondly, that if the judgment of the foreign Court appear to be consistent in principle with the laws of England, it will be noticed in the English Courts. And, thirdly, that such judgment, if not im-

peached when pleaded, may bind both parties in England to the same extent that it would bind them in the foreign country.

First:—English subjects, resident abroad, may apply to foreign Courts for justice (*a*). The laws of England take notice of foreign contracts, and the English Courts enforce them according to the laws of the country in which they were made. The subject-matter of the contract in this case is personal, and, generally speaking, personal contracts are not local, but follow the persons of the parties. This principle was distinctly laid down by Lord Loughborough, in the case of *Sill* v. *Worswick*, (*b*), where he said, "It is a clear proposition, not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of the proposition is, *not* that personal property has no *visible* locality, but that it is subject to that law which governs the person of the owner." Then, if foreigners and English subjects may, in this country, enforce contracts made abroad, and it is held, that contracts made in this country cannot be enforced in foreign countries, the subjects of this country will be under great hardship. While liable to the full extent upon all obligations cast upon them by the laws of foreign states, they will be destitute of all power to enforce their own rights, either against foreigners or fellow subjects. The statute of limitations would be in full force against a plaintiff, beginning to run from the time of the cause of action accruing, and open to a defendant to avail himself of it if ever he returned to England (*c*); while the plaintiff would be debarred of all means of recovering his demand abroad. The true principle seems to be, that as on the one hand

(*a*) Not so in France. See *Brunet* v. *(Lord) Crewe*, Mann. Dig. 2d ed. 358.

(*b*) 1 H. Bl. 691.

(*c*) Where both parties are in England at the time the cause of action accrued, though one or both should leave the kingdom the next day, the statute would have begun, and would continue to run. *Vide Doe*, dem. *DuRoure*, v. *Jones*, 4 T. R. 300; *Cotterell* v. *Dutton*, 4 Taunt. 826.

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the English Courts adjudicate upon contracts made in foreign countries, taking care to respect the laws of each country, and expect their judgments to be noticed by foreign Courts (*a*); so, on the other hand, foreign Courts may adjudicate upon contracts made here, taking care to respect the laws of England, and their judgments will, by the comity of nations, be noticed by the English Courts.

Secondly:—It may be assumed that the English Courts will not altogether reject a foreign adjudication, merely because it regards a contract made in this country; they will, at least, examine it. The cases on this subject, so far as regards foreign judgments, relate chiefly to judgments where the *cause of action* arose in a foreign country; a circumstance which differs them from the present case. Several of them will be found collected in the note to the case of *Walker* v. *Witter* (*b*). They are all cases in which the plaintiff is seeking to maintain an action upon a foreign judgment, and it appears from them all, as well as from a note to the case of *Collins* v. *Lord Mathew* (*c*), that a foreign judgment is *primâ facie* evidence of the debt, and is conclusive, unless impeached by the other party. Where, indeed, the foreign judgment is unjust upon the face of it, as in *Buchanan* v. *Rucker* (*d*), the English Courts will give it no attention whatever; but otherwise, it is *primâ facie* evidence

(*a*) But in France, by the Ordonnance de 1629, which is still in force as to such of its provisions as are not inconsistent with the modern codes, it is declared, (Art. 121,) that "les jugemens rendus, contrats ou obligations reçues ez royaumes et souverainetés étrangères, pour quelque cause que ce soit, n'auront aucune hypothèque ni execution en notre royaume; *ains* tiendront les contrats lieu de simples promesses; et nonobstant les jugemens, nos sujets contre lesquels ils ont été rendus, pourront de nouveau débattre leur droits *comme entiers* par devant nos officiers." This law, or so much of it as relates to judgments, was held in the Cour de Cassation (7 Jan. 1806,) to apply only to cases in which Frenchmen were defendants. The propriety of this construction was, however, denied, and a decision of the Court at Versailles founded thereon, in the case of *Boylan* v. *Henry*, 1819, was reversed in the Cour de Cassation.

(*b*) Dougl. 1.

(*c*) 5 East, 475.

(*d*) 9 East, 122.

to charge a defendant: and upon the same principle, it must be *primâ facie* evidence to discharge him. *Plummer* v. *Woodburne* (*a*) seems to be an authority upon this point;

(*a*) 7 D. & R. 25; 4 B. & C. 625. That was an action brought by merchants in London for supplies furnished to a planter. The evidence of the debt was clear and uncontradicted, but the jury found a verdict for the defendant. An action being afterwards brought in this Court to enforce the payment of the same claim, the defendant pleaded the general issue, and some special pleas. Upon several of the special pleas demurrers arose, the result of which will be found in the above report. The issues of fact, embracing the general issue to the whole declaration, coming on for trial at Guildhall, were referred to a barrister, before whom it was urged that the verdict in St. Christopher's, and judgment thereon by a Court of competent jurisdiction, to which the plaintiffs had elected to resort, amounted to *conclusive* evidence that the defendant had not undertaken or promised as stated in the declaration. To this it was answered, on the part of the plaintiffs, that it is settled by the case of *Walker* v. *Witter*, (*suprà*, note (*a*); and see *Henley* v. *Soper*, *ante*, 153;) and a series of concurring decisions, that a judgment for a plaintiff in a colonial Court would be only *primâ facie* evidence of a debt, if such judgment were sought to be enforced in the Courts of this country, and that a judgment for the defendant ought to carry with it no greater authority; that if a plaintiff, suing in a colonial Court upon two causes of action, should obtain a verdict establishing his demand upon the first count, and should fail upon the second count, and should afterwards bring an action here upon the same causes of action, it would be unreasonable to hold that the verdict was only *primâ facie* evidence to support demand A., whilst it was conclusive evidence to negative demand B.; and that, supposing the former verdict to create an estoppel, such estoppel is waived by the plea of non assumpsit, upon which the jury, or an arbitrator substituted for the jury, are bound to find according to the truth of the fact, without regard to the estoppel; *Vooght* v. *Winch*, 2 B. & A. 662; except where the proceedings are *in rem*, in which case the judgment in reality operates as a conveyance, whether the suit is instituted in the Court of Admiralty or Exchequer in England, (Mann. Exc. Pract. 2d ed. 181,) or before some foreign tribunal possessing a similar jurisdiction. The arbitrator, however, thought that he was bound by the former verdict, and refused to raise the question upon the face of his award, and thereby enable the plaintiffs to take the opinion of the Court upon the propriety of this decision.

In *Boutillier* v. *Thick*, 1 D. & R. 366, it is said that "an arbitrator is not bound to state the grounds of his decision." But in that case the arbitrator does not appear to have been requested to state the point of law on the face of the award. And in *Anon.* 1 Chitt. Rep. 675, it is said, "If an award is expected to

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because it was there held that a judgment obtained by a defendant in the colonial Courts cannot be pleaded by way of estoppel to a declaration in this country for the same cause of action, *unless* it is shewn that the judgment so obtained would be final and conclusive in the colonies. Here the judgment obtained is final and conclusive in Scotland, and is consistent with the principles of the English law upon the same subject. The proceeding by *cessio bonorum* (*a*) in Scotland, is analogous to the proceeding under the Insolvent Debtors' Act in England. *Sidaway* v. *Hay* (*b*) is an authority to shew that the proceeding by Scotch sequestration is analogous to the proceeding under the English bankrupt law, and binds the English creditor, whether he be a party to that proceeding or not. The defendant did not plead in that case, as he does in the present, that the plaintiff has taken the benefit of the Scotch proceedings. [*Bayley*, J. How does it appear in this case that the plaintiff took any benefit under the proceedings? He merely opposed the defendant in respect of his petition.] He placed himself in the situation of a Scotch creditor, by appearing before the Court, and opposing the defendant's petition. There was property of the defendant's which afterwards became available, and which might have been recovered for the benefit of the plaintiff. [*Bayley*, J.—In point of fact, none of it was recovered for his benefit; and he might be ignorant in point of law that it might be. He may have been unac-

be founded on a questionable principle of law, the parties ought to apprize themselves beforehand of the principle, and request the arbitrator to state it on the face of his award, in order that thereafter they might have the question discussed. In this case that had not been done; *and therefore, supposing the arbitrators to be erroneous* in their view of the law, their award could not be set aside." *Ideo quære.*

(*a*) As to which see Dig. lib. 42, tit. 3, *de cessione bonorum*; Inst. lib. 4, tit. 6, ad finem; Vinn. Inst. Imp. Comm. 840. Cessionis bonorum beneficium introduxit lex Julia. Beneficium est, quia etiamsi qui cedunt bonis bonorum venditionem patiantur, tamen infames ex eâ causâ non fiunt. Calvini Lexic. tit. Cessio bonorum. Et vide Cod. lib. 2, tit. 13, l. 11; *post*, 588, (*d*).

(*b*) 4 D. & R. 658; 3 B. & C. 12.

quainted with the Scotch law upon that subject.] That cannot be assumed now in his favour. He put the law in motion, and might have derived a benefit under it; therefore he must be presumed to have known the law, and must be bound by its decision (*a*).

Then, thirdly, as the judgment in this case would be binding upon the plaintiff in Scotland, it ought equally to bind him here. The defendant sought to procure his discharge from *all* his creditors, and did all that the Scotch law required him to do for that purpose. The plaintiff received notice of the proceedings, and made himself a party to them; and he has thereby obtained all the benefit for which he stipulated. [*Bayley*, J. That is the difficulty in the case. You assume that the plaintiff benefited by the proceedings; but it does not appear that he did. He did not even seek for any relief or benefit under the proceedings; on the contrary, he did all he could to oppose them.] He did enough to make himself a party: he admitted the jurisdiction of the Scotch Court, and he ought now to be bound by it. *Smith* v. *Buchanan* (*b*) will be relied upon by the other side, but it is distinguishable from the present case. It was there decided that a discharge under a commission of bankrupt in a foreign country is no bar to an action against the bankrupt by a subject of this country for a debt arising here. But in that case the creditor had not taken any benefit under the commission; he had not done any act to shew that he had consented to the discharge of his debtor: it did not even appear that he had received any notice of the proceeding. And upon this distinction the judgment of Lord *Kenyon* in that case seems mainly to have proceeded, for he said, "This is the case of a contract lawfully made by a subject in this country, which he resorts to a Court of justice to enforce; and the only answer given is,

(*a*) The distinction between *ignorantia juris* and *ignorantia facti*, (as to which *vide ante*, i. 566, (*f*),) does not apply to the law of a foreign country, such law being merely matter of fact here. *Mostyn* v. *Fabrigas*, Cowp. 174.

(*b*) 1 East, 6.

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that a law has been made in a foreign country to discharge these defendants from their debts, on condition of their having relinquished all their property to their creditors. But how is that an answer to a subject of this country suing on a lawful contract made here? How can it be pretended, that he is bound by a condition, to which he has given *no assent, either express or implied*?" Here the plea states that the plaintiff had notice of the proceedings, and that he appeared in the Scotch Court, and was heard by counsel in opposition to the defendant's petition. His appearing in that Court amounted to a consent on his part to be bound by its judgment, pronounced according to the Scotch law; and as that judgment was, that the defendant should be discharged out of custody, upon satisfying the condition required by the law of Scotland, the plaintiff is bound by that judgment, and the plea is an answer to the action.

In conclusion, it may be suggested, without prejudice to the foregoing line of argument, that the Court of Session in Scotland ought to be considered as a Court of the United Kingdom (*a*), having a local jurisdiction, rather than as a purely foreign Court: and that its judgments, therefore, ought to receive the greater degree of attention here. Appeal lies from the judgment of that Court to the same ultimate jurisdiction as that by which the judgment of this Court may be reviewed. Its proceedings are subject to the same legislature; and several modern Acts of Parliament have been passed to regulate them. *The Bank of Scotland* v. *Cuthbert* (*b*), and *Selkrig* v. *Davis* (*c*), recent decisions in the House of Lords upon appeals from the Scotch Courts, shew that the same principle prevails with respect to Scotch debts provable under an English commission of bankrupt, as was acted upon with respect to an English debt provable

(*a*) It has been held that the statute of limitations, 21 *Jac.* 1, c. 16, runs against a plaintiff residing in Scotland, as being within the realm. *King* v. *Walker*, 1 W. Bla. 286.

(*b*) 1 Rose, 462.

(*c*) 2 Rose, 318.

under a Scotch sequestration in *Sidaway* v. *Hay* (*a*): and the provision in the Insolvent Act, 7 *G.* 4, c. 57, s. 42, for inserting notice of insolvencies in the Edinburgh Gazette, shews that Scotch creditors may come here and oppose an insolvent, and share the fund with English creditors; and leads to the inference, that they could not afterwards sue the insolvent in Scotland, for a debt contracted there. Upon the whole, it is evident, that the Scotch Courts take notice of the bankrupt and insolvent laws of England, and give effect to judicial decisions upon them; and it is submitted that the converse cannot fairly be resisted, and is decisive of the present case in favour of the defendant.

E. H. Alderson, contrà, was stopped by the Court.

BAYLEY, J.—It has been very properly conceded by Mr. *Barstow* in the course of his able argument, that a discharge in a foreign country is only *primâ facie* evidence of a discharge from debts contracted here, and will not, of necessity, preclude an English creditor from suing in an English Court, for the recovery of a debt contracted in England. It was decided in the case of *Lewis* v. *Owen* (*b*), that a debt contracted in England is not discharged by a certificate under a commission of bankruptcy issued in Ireland since the Union. But a discharge of a debt under the provisions of an Act of Parliament of the United Kingdom, which is competent to legislate for every part of the kingdom, and to bind the rights of all persons whether residing in England or Scotland, and which purports to bind the rights of subjects both in England and Scotland, operates as a discharge in both countries. The case of *Sidaway* v. *Hay* (*c*) was decided upon that very ground, this Court being of opinion, upon the principle I have mentioned, that a discharge under a Scotch sequestration, issued in conformity with the statute 54 *G.* 3, c. 157, was an effectual bar to an action for a debt

(*a*) 4 D. & R. 658; 3 B. & C. 12.
(*b*) 4 B. & A. 654.
(*c*) 4 D. & R. 658; 3 B. & C. 12.

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contracted in England, before the sequestration, by a trader resident in Scotland. But the defendant in this case was not discharged under the provisions of that statute. He was discharged upon making a *cessio bonorum*, which, by the law of Scotland, operates as a discharge of the party from all debts contracted in Scotland. The Court of Session in Scotland has, *primâ facie*, jurisdiction over Scotch subjects and debts contracted in Scotland only. The plaintiff is an English subject, and is suing in an English Court for the recovery of a debt contracted in England. *Primâ facie*, therefore, he is not bound by an adjudication of the Scotch Court. But it is insisted that he sought relief from the Scotch Court, that he, therefore, by implication, consented to be bound by the Scotch law, and that he is, consequently, barred by the judgment of that Court pronounced according to that law. I cannot find it stated upon this record that the plaintiff did seek relief from the Scotch Court. The plea states that the defendant being incarcerated in the Tolbooth for debt, presented a petition to the Lords of Session, by which, after stating that the plaintiff, among others, was his creditor, and that he had offered to convey all his effects to his creditors, and that they, including the plaintiff, had refused to accept such conveyance, he prayed that he might be set at liberty upon making a disposition of all his effects for the benefit of his creditors, and might not in future be incarcerated, or troubled for payment of any debts due to the persons named in the petition. The object of the petition, therefore, was, that the defendant should be freed from arrest *in Scotland* in respect of those debts. The plea then states that it was ordered that notice should be given to the creditors named in the petition, including the plaintiff, to compear before the Court of Session, to answer the defendant in respect of the petition. The object of that notice was that the creditors should have an opportunity of shewing cause why the prayer of the petition should not be granted. The plea then avers that such notice was given to the creditors, and, among others,

to the plaintiff, that the subject-matter of the petition was heard, that the plaintiff among others appeared by counsel, and was heard in opposition to the defendant, *in respect of the petition*, and that the defendant was ordered to be set at liberty. It is insisted that the fact of the plaintiff's having appeared in the Scotch Court, and there opposed the granting of the prayer of the petition, distinguishes the present case from that of *Smith* v. *Buchanan* (*a*). It does not appear to me to have that effect. It is not shewn by the plea that the plaintiff claimed a distributive share of the defendant's property, though it states that property of the defendant's became available, and might have been recovered for the benefit of the plaintiff among other creditors; it shews only, that the plaintiff endeavoured to prevent the defendant from being discharged *in Scotland* in respect of his debt. One part of the prayer of the petition is that all Judges and officers of the law should be restrained from molesting the defendant for payment of his debts. If the plaintiff could have opposed that part of the petition with success, he would have been entitled to sue the defendant in the Scotch Courts for his debt, and the whole object of his opposition seems really to have been, to preserve to himself the right of proceeding against the defendant for his debt in Scotland. If the plaintiff had sought relief from the Scotch law; if he had received or claimed his distributive share, as a creditor, of the defendant's property; there might have been ground for saying that he had consented to be bound by that law, and by the judgment of the Scotch Court. But, as the facts stand upon these pleadings, I am clearly of opinion that there was no consent on the part of the plaintiff, express or implied, to be bound by the judgment of the Scotch Court, that his debt, therefore, is a subsisting debt, and that, as an English creditor, he is not debarred by the proceedings in Scotland from enforcing payment of that debt in an English Court of justice. For these reasons I am of opinion that the judgment of the Court must be for the plaintiff.

(*a*) 1 East, 6; *ante*, 581.

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HOLROYD J.—I am of the same opinion. I think this case falls directly within the principle of the decision in *Smith* v. *Buchanan* (*a*), and is perfectly distinguishable from the case of *Sidaway* v. *Hay* (*b*). The only possible argument on the part of the defendant here is, that by appearing in the Scotch Court, and opposing the defendant's discharge, the plaintiff acknowledged the jurisdiction of that Court, and impliedly consented to be bound by it. But I think his so appearing makes no difference in the case, because he did not seek relief from the Scotch Court, nor claim the benefit of the Scotch law. He may have appeared in the Scotch Court for the purpose of objecting to its jurisdiction; and if so, it is quite clear that he may now insist that their judgment is a nullity, in the same manner as a party, who has appeared in the spiritual Court, may insist that the judgment of that Court is void (*c*).

LITTLEDALE, J.—I am also of the same opinion. It is admitted that the plea could not have been supported, if it had not alleged that the plaintiff appeared in the Scotch Court. I think that makes no difference in the case. If the plea had alleged that the plaintiff sought to avail himself of the Scotch law, by claiming a distributive share of the defendant's property, the case might have been different. But the only allegation is, that the plaintiff appeared in Court by counsel and was heard in opposition to the defendant in respect of the petition. The ground of his opposition does not appear. It may have been that the Scotch Court had no jurisdiction, or that the defendant was a fraudulent debtor (*d*), and that for that, or some other reason, he was not entitled, by the law of Scotland, to be

(*a*) 1 East, 6; *ante*, 581.

(*b*) 4 D. & R. 658; 3 B. & C. 12; *ante*, 581.

(*c*) *Vide Crogate's* case, 4 Rep. 67 a, first resolution; *Beaurain* v. *Scott*, 4 Campb. 388. And see *Bushel's* case, Vaugh. 143.

(*d*) Ut qui *sine dolo suo malo* æri alieno satisfacere non posset, *bonis* suis *cedendo* liberaretur. Calv. Lexic. tit. *Julia, de cessione bonorum*. But the future effects were liable. Dig. lib. 42, tit. 3, lex 4. So in France, Code Napoleon, No. 1270.

discharged upon making a *cessio bonorum* (*a*). It is, however, perfectly immaterial upon what ground the plaintiff opposed the defendant; because he did not seek relief from the Scotch Court, nor claim the benefit of the distribution of the defendant's property under the Scotch law: he is, therefore, not bound by the judgment of that Court, founded upon that law, and is entitled to maintain the present action.

Judgment for the plaintiff (*b*).

(*a*) *Ante*, 581, (*a*).

(*b*) In *Ballantine* v. *Golding*, (M. 24 *G.* 3, B. R. Cooke's Bankrupt Laws, 499; 6th ed. 520,) "on a motion to enter an exoneretur on the bail-piece, it appeared that the defendant had been a bankrupt, and obtained a certificate under the great seal of Ireland. The original demand arose upon a bill of exchange drawn in Ireland, and payable by the defendant, who resided there. Lord *Mansfield* said, it is a general principle, that where there is a discharge by the law of one country, it will be a discharge in another; *that he remembered a case in Chancery of a* cessio bonorum *in Holland, which is held a discharge in that country, and it had the same effect here.* The rule was enlarged, and was afterwards made absolute by consent, the counsel giving it up upon the authority of *Burrows* v. *Jemino*." In *Ballantine* v. *Golding*, the cause of action appears to have arisen wholly in Ireland; and in the case of *cessio bonorum*, referred to by Lord *Mansfield*, it must be presumed that the cause of action arose wholly in Holland. In *Burrows* v. *Jemino* (2 Stra. 733, *S. C. totidem verbis*, 2 Eq.Ca. Abr. 524), the case was this:—"A bill of exchange was drawn upon the plaintiff at Leghorn, which he accepted; but by the law there, if a bill be accepted and the drawer fail, and the acceptor hath not sufficient effects of the drawer in his hands at the time of the acceptance, the acceptance becomes void. And this happening to be the plaintiff's case, in order to discharge himself of this acceptance, he instituted a suit at Leghorn, and his acceptance was thereupon vacated by a sentence in that Court. Afterwards the plaintiff returned to England, and was sued here at law upon this bill; and thereupon he exhibited his bill in this Court for an injunction and relief.

King, Lord-Chancellor, was clearly of opinion that this cause was to be determined according to the local laws of the place where the bill was negotiated; and the plaintiff's acceptance of the bill having been vacated and declared void by a competent jurisdiction, he thought that sentence was conclusive, and bound the Court of Chancery here."

The case of *Burrows* v. *Jemino* is frequently cited for the purpose of shewing that the Courts of this

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country are conclusively bound by foreign judgments. But the decision of Lord *King* may be considered as standing upon a very different ground. The law of Leghorn being, that an acceptance may be defeated by matter ex post facto brought before the proper tribunals, the acceptance in question must be taken to have been given with reference to the lex loci; incorporating which, it would appear to have been originally a conditional or defeasible acceptance, having no other force or effect than if *Jemino* had expressly written upon the face of the bill, "Accepted—payable by me, the drawee, unless the drawer become insolvent, and such insolvency be established by the declaration of a particular Court at Leghorn." In this view of the case it would have been manifestly unjust to exclude the defendant from shewing that the contingency by which the acceptance was to be defeated had happened.

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1. Under 38 *G.* 3, c. 5, ss. 9 & 17, and 43 *G.* 3, c. 99, s. 33, where payment of assessed taxes is demanded upon the premises in the absence of the owner, mere non-payment, without notice of the demand, is not a neglect or refusal to pay, to justify an immediate distress: a reasonable interval must be allowed between the demand and the seizure. *Gibbs* v. *Stead.* *page* 547

ASSIGNEES.

See BANKRUPT, I.—LEASE.

ASSIGNMENT.

I. *Of chose in action.*

And see EXECUTORS AND ADMINISTRATORS, 7.

1. Where there is an ascertained debt from *A.* to *B.*, and an equal or larger debt from *C.* to *A.*, and all agree that *C.* shall be *B.*'s debtor instead of *A.*, and *C.* promises to pay *B.*, an action will lie upon such promise. *Fairlie* v. *Denton and another.* 353
2. *Secus*, if at the time of the promise the debt from *C.* to *A.* is unliquidated or incomplete. *ibid.*

II. *Of term of years.*

See LEASE, 1, 2.

III. *Of right of entry.*

See ENTRY.

3. Not allowed. 496

IV. *Of estate pur auter vie.*

4. As to the necessity of introducing words of limitation, *see* 251 (*d*), 253 (*d*), 259 (*e*)

V. *Of pauper apprentices.*

See SETTLEMENT, I.

ASSUMPSIT.

I. *Consideration.*

1. Doubtful liability sufficient to support express promise. *page* 82, *n.* (*b*).

II. *For work and labour.*

2. To support an action for work and labour, that on which the work is performed must be the property of the defendant. *Atkinson* v. *Bell.* 292

III. *For goods bargained and sold.*

3. To support an action for goods bargained and sold there must be either an actual sale of goods existing at the time of the contract, or a specific appropriation of goods afterwards assented to by the buyer. *Atkinson* v. *Bell.* 292

IV. *For money had and received.*

4. *A.* and *B.* deposit with *C.* 20*l.* each, to abide the event of a fight between them. After the battle a dispute as to which is the winner is referred to *D.*, who decided in favour of *B.* *A.* demands the whole 40*l.* from *C.*, and gives him notice not to pay it to *B.* *C.*, nevertheless, pays over the 40*l.* to *B.* *A.* may recover his own 20*l.* from *B.* as money received to his use. *Hastelow* v. *Jackson.* 209

ATTACHIARI FECI.

1. Return of, to found a prayer of garnishment in the Mayor's Court against the holder of goods belonging to the defendant. 565, n.

ATTACHMENT.

See SHERIFF.

AUTHORITY.

1. Coupled with an interest, not revocable. 178

AVOWRY.

I. *In respect of what duty.*

1. Cannot be made for the arrears of an annuity, (not being also a rent-charge.) *page* 204

AWARD.

See ARBITRAMENT.

BAIL.

1. Time invariably refused for putting in and perfecting bail where cause removed from inferior court. 367

BAILIFF.

I. *Of a borough.*

See CORPORATION.

II. *Of a liberty.*

See OFFICER.

III. *Of a sheriff.*

See OFFICER.

BAILMENT.

See ACTION ON THE CASE, 1.—INNKEEPER, 1.—LIEN, 1.—PLEADING, 2.

1. Negligence of bailee of goods pleaded. 185
2. Whether bailor or bailee liable for injury caused by the thing bailed.

BANKRUPT.

I. *Actions by assignees.*

1. In contemplation of a dissolution of a partnership between *A.* and *B.*, a warrant of attorney is given by *C.* to *A.* to secure a debt owing from *C.* to *A.* and *B.* Before the partnership is actually dissolved, *C.* commits an act of bankruptcy. A sum paid by *C.* to *A.* after the dissolution of partnership on account of the debt and a farther sum levied under an execution against *C.*'s goods, are money received by both *A.* and *B.* to the use of the assignees of *C.* *Biggs* v. *Fellows*, 450.

II. *Mutual credit.*

2. *A.* accepted bills drawn by *B.* his banker, who discounted the bills and indorsed them for value to *C.* *B.* became bankrupt before the bills were due, having in the hands of *C.* money more than sufficient to cover the bills, and having in his own hands money of *A.* *C.* presented the bills when due to *A.* for payment, which was refused, whereupon he paid himself out of the money of *B.* in his hands, and gave up the bills to *B.*'s assignees. In an action by *B.*'s assignees against *A.* upon the bills: Held, that there was a mutual credit between *A.* and *B.* before the bankruptcy, and that *A.* might set off against the claim of *B.*'s assignees in respect of the bills, the sum due to him from *B.* at the time of his bankruptcy. *Bolland and others* v. *Nash.* *page* 189

III. *Assets, how marshalled.*

3. *A.* obtains a judgment by confession, or by *nil dicit* against *B.*, and issues a *fi. fa.* under which *B.*'s goods are seized: whilst the goods remain unsold in the sheriff's hands, *B.* commits an act of bankruptcy on which a commission issues. The sheriff, after notice of the commission, sells the goods and pays over the proceeds to *A.* The amount is money had and received by the sheriff to the use of the assignees. *Notley* v. *Buck.* 68

4. Whether the sale by the sheriff, after such notice, was wrongful, and would support an action of trover, quære. *ibid.*

5. Where a creditor obtains judgment by *nil dicit* against his debtor, whose goods are seized by the sheriff before his bankruptcy, but not sold till after it, the Court will not compel the sheriff to pay over the proceeds of the sale to the assignees, although the validity of the commission be not impugned. *Washbourn, in re.* 374

6. No jurisdiction in Chancery to make a creditor of a bankrupt refund what he may have received exceeding the amount of the dividend, until he come in to prove under the commission. *page* 71

IV. *Examinations under commission.*

7. A party committed for not answering satisfactorily before commissioners of bankrupt, may have a *habeas corpus* to bring him before the commissioners for further examination, but cannot throw the expense of bringing him up on the estate by a *mandamus.* *Bagster, ex parte.* 464

8. Where a witness summoned to give evidence before commissioners of bankrupt refuses to appear, they may issue their warrant for his apprehension without having information upon oath of such refusal. *Grocock* v. *Cooper.* 78

9. In an action by such witness against the commissioners for false imprisonment, the reasonableness of the summons and of the tender of expenses, is a question of fact for the jury. *Grocock* v. *Cooper.* 78

V. *Disability of bankrupt to sue.*

10. A plea in bar, stating "that a commission of bankrupt issued against plaintiff, under which he was duly found, adjudged, and declared a bankrupt" without alleging that he was in fact a bankrupt, is bad. *Gwinness* v. *Carroll.* 132

11. A plea of bankruptcy in the plaintiff should state the trading, the act of bankruptcy, and the petitioning creditor's debt. *ibid.*

12. Whether in debt on judgment, a replication to a plea of bankruptcy in the plaintiff, after the accruing of the cause of action whereon judgment was recovered, that plaintiff obtained his certificate before the judgment was recovered, should allege expressly that the certificate was obtained after the commission issued, *quære.* *ibid.*

BARON AND FEME.

I. *Validity of Marriage.*

See MARRIAGE, 1, 2.

II. *Liability of Wife to arrest.*

See FEME COVERT.

BERWICK UPON TWEED.

1. Venue in action arising there. *page* 383, n. (*b*)
2. Locality of borough, *ibid.*
3. Fines of land in, *ibid.*
4. Ejectment for lands in, *ibid.*
5. Within purview of 58 *Geo.* 3. cap. 57, as to jurisdiction of justices to make a rate in the nature of a county rate *Rex* v. *Berwick upon Tweed.* 378

BILLS AND NOTES.

I. *Consideration.*

1. A bill accepted for differences on time bargains in stock, is valid in the hands of an indorsee. *Greenland* v. *Dyer.* 422

II. *Acceptance.*

2. Acceptor impliedly engaged to indemnify payee against the consequences of his indorsement. 429
3. Defeasible by law of Leghorn upon insolvency of drawer. 589, *n.*, 590, *n.*

III. *Notice of Dishonour.*

4. Holder must use reasonable diligence to discover residence of indorser. 365
5. Notice given as soon as residence of indorser is discovered is due notice of dishonour. *ibid.*
6. Extreme promptitude not so important in giving notice of dishonour after unavoidable delay as upon the first intelligence. 361
7. Special facts rendering valid a deferred notice of dishonour will support the common averment of notice. *ibid.*
8. An indorsee not knowing the indorser's address, employs his attorney to discover it and give notice of dishonour; the attorney discovers the address one day, consults his client the second, and gives notice the third. Held, a valid notice. *Firth* v. *Thrush.* *page* 359
9. Banker holding bill for customer not bound to give notice on very day bill is dishonoured. 364
10. Semble, that an agent to indorse is also agent to receive notice of dishonour. *ibid.*

IV. *Evidence in action.*

11. A payment of interest by *A.* on the joint and several note of *A.* and *B.*, is evidence of a promise by *B.*, and takes the note out of the statute of limitations though *B.* was a mere surety, and the payment was made without his knowledge. *Burleigh* v. *Stott.* 93
12. In an action by bill, on a bill of exchange falling due after the first day of the term of which the declaration is entitled generally, the plaintiff's attorney may give verbal evidence that the action was not brought until after the bill of exchange became due, without producing the writ. *Lester* v. *Jenkins.* 429
13. In answer to an action upon a bill drawn by the defendant, and by him indorsed to the plaintiff, the acceptor cannot be called to prove that it was indorsed upon a consideration which failed through the default of the plaintiff. *Edmonds* v. *Love.* 427

V. *Right of action upon, where merged in the relation of partner.*

14. *B.* member of and agent for a joint stock company, sells their goods on a *del credere* commission to *A.* *A.* accepts bills payable to the order of *B.* which *B.* indorses to the actuary of the company, who indorses them to *C.* another member. *A.* failing before the bills are due, pays *B.* 10*s.* in the pound on account of the bills:

B. is not liable to *C.* on the bills or for money received to his use. *Teague* v. *Hubbard.* *page* 369

VI. *Interest, where recoverable.*

15. A bill or note payable on a day certain, carries interest from that day unless the nonpayment has been occasioned by the negligence of the holder. *Laing, gent. one, &c.* v. *Stone.* 561

BILL OF MIDDLESEX.

1. Good continuance of a suit commenced by *latitat.* 531

BOND.

1. Distinction between counterbond and bond of indemnity. 181
2. *A.* being principal, and *B.* surety in an annuity bond to *C.*, *A.* gives *B.* a bond conditioned to pay the annuity to *C.* and to indemnify *B.* from any claims of *C.*; this was not a mere indemnity bond; *B.* therefore may put it in suit as soon as *A.* makes default in payment of the annuity, without proving that he has been actually damnified. *Penny* v. *Foy.* 181

BOROUGH.

See CORPORATION.

BOROUGH ENGLISH.

1. Descent of estate *pur auter vie* in, 251, (*d*)

BRIDGES.

See 104.

BURGESS.

See CORPORATION.

BUILDING ACT.

See 268.

BURGLARY.

I. *Requisites to constitute.*

1. What shall be considered a dwelling house. *page* 434

CERTIFICATE.

I. *Of Speaker of House of Commons.*

See ELECTION PETITION, 2, 3, 4, 5, 6, 8, 9, 10.

CERTIORARI.

I. *When granted.*

1. Where an appeal against an order of removal is adjourned on the ground of the justices being equally divided, this Court will not grant a *certiorari*, for the purpose of quashing the order of removal and the order of adjournment, upon affidavits shewing that the apparent equality of numbers was occasioned by the vote of a magistrate who was a rated inhabitant of the respondent parish, and had joined in making the order of removal. *Rex* v. *Uske.* 172

II. *Effects of.*

2. Where the prosecutor of an indictment for a misdemeanour found at sessions, removes it into K. B. by *certiorari*, he is not entitled to costs, under 7 *G.* 4, c. 23. *Rex* v. *Rowlands.* 405

CESSIO BONORUM.

I. *In Scotland.*

1. The discharge of an insolvent by *cessio bonorum* in Scotland, is no bar to an action brought by an English creditor in England for a debt contracted in the latter country, though the plaintiff opposed the defendant's discharge in Scotland, unless he sought relief under the Scotch law, by claiming a distributive share of the insolvent's property. *Phillips* v. *Allan.* 576

II. *In Holland.*
See 589 (*n*).
III. *In France.*
2. Future effects liable. *page* 588 (*d*)
IV. *By the Roman law.*
3. Not available against a liability arising out of fraud. 588 (*d*)
4. After-acquired property not discharged. *ibid.*
5. Imposing a peculiar dress. 577 (*a*)
6. But not rendering infamous. 582 (*a*)

CHARTER.

See CORPORATION.

CHARTER-PARTY.

I. *What instrument shall amount to.*
See SHIP, 2.

CHIMNEY-SWEEPER.

See SETTLEMENT, 6.

COLONIAL COURTS.

I. *Course of proceeding in.*
1. The suitor must make out the substance of his claim, but is not tied down to matters of form. 166

COLONIAL JUDGMENT.

I. *How enforced.*
And see ESTOPPEL, III.
1. An action will lie upon the decree of a Colonial Court of Equity, for the balance of an account between partners. *Henley* v. *Soper*. 153
2. In such action the Court will look at the substance, without regarding the form of the proceedings upon which the decree is founded. *ibid.*

COMMON.

1. Distress for rent of. 204, 5

COMPOSITION MONEY.

See HIGHWAYS.

CONCESSIT SOLVERE.

1. Proceedings upon, in the Lord Mayor's Court, where defendant has goods in specie within the jurisdiction. *page* 565, n.

CONSTRUCTION.

I. *Of statutes.*
1. The meaning of particular words in a statute is to be collected from the occasion on which they are used, and the object sought to be attained. 103, 104
2. Equivocal words to be construed most strongly in favour of the public, upon whom burthen imposed. 111, 112
II. *Of deeds.*
See BOND.—DEED.—ESTATE, 1.

CONTINGENT REMAINDER.

I. *When created.*
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II. *When vested.*
See ESTATE, 1.
III. *How transferred.*
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IV. *When destroyed.*
See 503.

CONTINUANCE.

I. *Of process.*
1. Latitat continued on the roll to avoid statute of limitations. 529

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And see AGREEMENT.—ASSUMPSIT.
I. *By implication.*
1. Implied contract not to be raised where there is an express contract. 440

COPYHOLD.

I. *Estates pur auter vie.*

1. Not subject of general occupancy. *page* 266, n.

II. *Inspection of Court Rolls.*

See 128 (*a*).

CORONER.

1. *Semble,* that there may be a valid custom for a coroner to appoint a deputy. *Carruthers, ex parte.* 397

And see INQUEST.

CORPORATION.

I. *Mitigation of rule requiring presence of majority of each definite body.*

1. A charter directed that a borough should consist of a mayor, four jurats and two bailiffs, and that when any jurat or bailiff should die, &c., the remaining jurats and bailiffs, or the greater part of them, of whom the mayor should be one, should elect another or others of the burgesses or inhabitants to be a jurat, &c. One vacancy occurred in the office of jurat, and an inhabitant was elected a jurat by a meeting, at which the mayor, two jurats, and two bailiffs were present: Held, a good election; the rule requiring the presence of a majority of each definite part of the elective body not applying, where in case of one vacancy, viz. in the office of bailiff, it would be impossible for a majority of the bailiffs to be present. *Rex* v. *Greet.* 391

II. *Notice of meeting.*

2. Where powers are vested in a select body appointed to be aiding and assisting the mayor, a notice by the mayor to the members of that body to attend a corporate meeting, need not specify the purpose for which the meeting is convened, and an election at such meeting is valid. *Rex* v. *Pulsford.* 384

III. *Protection of corporator de facto.*

3. The Court will not grant a *quo warranto* information against a party who has exercised a corporate office for six years. *Rex* v. *Brooks.* *page* 384

IV. *Production of corporation books.*

See 417.

COSTS.

And see ELECTION PETITION.

I. *In civil cases.*

1. Where a *mandamus* issues under 13 *Geo.* 3, c. 63, s. 44, to examine witnesses in India, the plaintiff having recovered a verdict, is entitled to his costs of cross-examining such witnesses. *Whytt* v. *Macintosh.* 133
2. Where a mistaken verdict was given in consequence of the omission of the judge to draw the attention of the jury to a material feature in the case, the Court imposed the terms of the payment of costs on the granting of a new trial, the judge not having been requested to enter into a fuller explanation. But the costs of a former trial, where the verdict was set aside for misdirection, and of an intermediate postponement by making the cause a remanet, were directed to abide the event. *Gibbons* v. *Phillips.* 238
3. Payment of costs, where made a condition of granting new trial. 438

II. *In criminal cases.*

4. The prosecutor of an indictment for a misdemeanor found at Sessions, removing it into K. B. by *certiorari,* is not entitled to costs under 7 *Geo.* 4, c. 64, s. 23. *Rex* v. *Rowlands.* 405

COUNSEL.

See PRACTICE, 16.

COUNTERBOND.

See BOND.

COUNTY RATE.

1. The borough of Berwick-upon-Tweed is within the purview of 53 *Geo.* 3, ch. 51, s. 24; and the justices may make a rate in the nature of a county rate upon the borough. *Rex* v. *Justices of Berwick-upon-Tweed.* *page* 378

COURT OF REQUESTS.

I. *Jurisdiction.*

1. Where an exclusive jurisdiction is given to a Court of Requests over debts not exceeding 5*l.* with an exception of actions for the balance of an account originally exceeding that sum, a party who sells several articles which the vendee treats as forming parts of one account, may sue in the superior Courts, though all the items of the account have been satisfied, except the last, which does not amount to 5*l.* *Carden* v. *Burford.* 178

COVENANT.

See LEASE.

CUSTOMARY FREEHOLD.

See 169.

CUSTOMS.

I. *Authority to seize goods.*

See 35. 37. 39. 40. 42.

DAMAGES.

I. *How measured.*

1. In replevin. 419 (*a*)

II. *Damnification.*

2. Must be shewn by party suing on mere indemnity bond. 183
3. Not necessary to be proved, by surety in annuity deed, in an action, or upon a set-off upon a counter-bond conditioned to indemnify *and also* to pay the annuity. 181

DE INJURIA.

1. Replication of, in trespass. *page* 185
2. In case, for libel. 74

DEBTOR AND CREDITOR.

I. *Transfer of debt.*

1. Where there is an ascertained debt from *A.* to *B.*, and an equal or larger debt from *C.* to *A.*, and all agree that *C.* shall be *C.*'s debtor instead of *A.*, and *C.* promises to pay *B.*, an action will lie upon such promise. *Fairlie* v. *Denton* and another. 353
2. *Secùs*, if at the time of the promise the debt from *C.* to *A.* is unliquidated or incomplete. *ibid.*

II. *Time of payment.*

3. Debitum in præsenti, solvendum in futuro. 192

DECLARATION.

See PLEADING, I.—PRACTICE, II.

DEED.

And see FEME COVERT, 2.—FRAUDS, STATUTE OF, 3.

I. *Construction of.*

1. Where the habendum of a conveyance shall control the premises. 266, n.

DEFAMATION.

I. *Privileged communication.*

A. obtains a warrant to search the house of *B.* for goods suspected to be stolen, and in accompanying the officer to execute the warrant tells him that *B.* has robbed him. This is not a privileged communication. *Dancaster* v. *Hewson* 176

DEMISE.

See EJECTMENT, 3.—ESTATE, 36, 37, 40, 42.

DEPUTY.

See CORONER, 1.—OFFICE, II.

DEVISE.

And see ESTATE, 4. 23.—EXECUTORY DEVISE.

I. *To what period the contingencies of survivorship are referable.*

1. Devise "to *A.* for life, and from and after her decease, to the surviving children of *B.* and *C.*" The only child of *B.* died during the life of *A.* Held, that the period of survivorship referred to the death of the testator, and that the heir-at-law of the deceased child of *B.* was entitled to share with the children of *C.* who survived *A.* *Doe* d. *Long* v. *Prigg.* *page* 338

DISTRESS.

I. *For what rent.*

1. For rent of common. 204, 205

II. *Where taken.*

2. Demise of a wharf, &c. with liberty to land and load goods, together with all ways, paths, passages, easements, profits, commodities, and appurtenances to the said wharf, &c. belonging or appertaining. The landlord cannot distrain barges lying opposite the wharf between high and low-water mark, and attached by ropes to the wharf, though it be found by verdict that the exclusive use of the land between high and low-water mark was demised as appurtenant to the wharf, as well when covered with water as dry. *Buszard* v. *Capel.* 197
3. Goods hoisted up to a warehouse not distrainable for the rent of the warehouse until within the site of the warehouse. 205

III. *How conducted.*

4. What shall amount to a seizure under, 538
5. What shall amount to an abandonment of, *ibid.*
6. Landlord's agent walked round a demised wharf, left a written notice that he had distrained goods lying there for rent, and that they would be appraised and sold, if not replevied, &c.; he then went away, leaving no one in possession. Held, an actual seizure; and no abandonment as between landlord and tenant in an action for an excessive distress. *Swann* v. *The Earl of Falmouth.* *page* 534
7. *Semble*, that an infant cannot be a bailiff to distrain. *Cuckson* v. *Winter.* 313
8. Service of a notice of replevying by an infant is illegal and void. *ibid.*
9. The sale of goods under a distress, after service of an irregular notice of replevying without removing the goods off the premises, is not a conversion. *ibid.*

IV. *Fraudulent removal.*

10. What shall be a fraudulent removal of goods, with intent to prevent a distress. 570
11. Removal of goods for the purpose of avoiding distress, must be clandestine to make it fraudulent. 205
12. To support an action on 11 *Geo.* 2, c. 19, s. 3, for assisting a tenant in fraudulently removing his goods, with intent to prevent a distress, the defendant must be privy to the fraudulent intent, and must actually assist in the removal. *Brooke* v. *Noakes.* 570

V. *For taxes.*

See ASSESSED TAXES.

EJECTMENT.

I. *Title of lessor.*

And *see* ENTRY, 2.—ESTATE, 1.

1. Induction upon a simoniacal presentation is void against the presentee of the Crown, who upon being inducted may maintain ejectment against the simoniac. *Doe* d. *Watson* v. *Fletcher.* 206
2. Whether driven to action of *quare impedit.* 207

3. Where joint lessors are partners in trade, a notice to quit in the names of all, signed by one only, is valid. *Doe* d. *Elliot* v. *Hulme.* *page* 433
4. If a pauper who has occupied a parish house by sufferance leave it for a time, the parish officers may enter and take possession without giving notice to quit, and without pursuing the provisions of 59 *G.* 3, c. 12, s. 24. *Wildbore* v. *Rainforth.* 185

II. *Premises, how described.*

5. Ejectment lies for a messuage *and tenement.* *Dyeball* v. *Doe.* 184

III. *Form of demise.*

6. Joint demise, by tenants in common. 435
7. Separate demises, by joint tenants. *ibid.*

ELECTION PETITION.

I. *Regulations common to sitting members and petitioners.*

1. Costs and expenses upon election petitions how taxed. 441
2. Speaker's certificate to have effect of a warrant of attorney to confess judgment. 443
3. Speaker's signature to the taxation of costs to be verified by affidavit, on a motion to enter up judgment on his certificate of costs of witnesses before election committee. 444, n.
4. Speaker's certificate should state by whom the witness was summoned. *ibid.*
5. So it should state to whom the costs are to be paid. *ibid.*
6. Speaker's alleged practice to grant certificate without inquiring whether the witness was summoned or not, censured. 447

II. *Regulations affecting petitioners only.*

7. Recognizances to be entered into by petitioners against an undue return, for the payment of all costs expenses, and fees. *page* 441
8. Speaker to certify recognizance and default into Exchequer. 442
9. Recognizance and Speaker's certificate of default, by and to whom to be delivered.
10. On refusal of payment of costs, &c. certified by Speaker, remedy for *nomine pœnæ* on recognizances to be entered into by petitioners for payment of all costs, expenses, and fees. 441

ELEGIT.

I. *Priority between judgment creditor and other incumbrancers.*

1. Estate by elegit defeasible by entry of party entitled to a term created before the judgment. 540
2. *A.* in 1819 demises lands to *B.* for 100 years, and subject thereto he, in 1820, demises for 200 years to *C.*, who enters. In 1822 *D.* recovers judgment against *A.* *D.* issues and executes an elegit under which the lands are delivered in execution. *C.* is entitled to the lands in possession as against *D.*, it not appearing that *B.* had entered under the demise to him. *Chatfield* v. *Parker.* 540

EMANCIPATION.

See PAUPER, V.

ENTRY.

And see ELEGIT, 1, 2.

I. *Right of entry.*

1. Not assignable. 495
2. But it may be nominally demised in ejectment. *ibid.*
3. Not tolled by entry of heir of disseisor of estate *pur auter vie.* 257, 258

II. *Actual entry, where necessary.*

See ESTATE, I.

EQUITY.

See BANKRUPT, 6.—COLONIAL JUDGMENT, 1, 2.

ERROR.

I. *Error in fact.*

1. Error in fact primarily cognizable only in the Court in which the erroneous judgment is pronounced. *page* 285, *n.* (*c*)

II. *Error in law.*

2. From the Court of Exchequer to the Lord Chancellor and Lord Treasurer in the Exchequer Chamber. 285

ESCAPE.

I. *Proof of original cause of action against prisoner.*

1. In an action against the marshal for the escape of a prisoner committed under an attachment for not performing an award, an allegation that plaintiff and the prisoner referred their disputes for arbitration "by mutual bonds of submission," is a material and necessary allegation and must be strictly proved; proof of the prisoner only having executed a submission bond, is insufficient. *Brazier* v. *Jones.* 88

ESTATE.

I. *Construction of instruments creating estate.*

1. By a marriage settlement Whiteacre is limited to *A.* for life, remainder to trustees during the life of *A.* to preserve contingent remainders; remainder to *B.* for life, remainder to the trustees during the life of *B.* to preserve, &c.; remainder to the sons of *B.* by *D.* successively in tail male; remainder to the right heirs male of *B.*

By the same deed Blackacre is limited to *B.* for life, remainder to trustees during the life of *B.* to preserve, &c.; remainder to *D.* for life, for raising out of the rents, &c. an annuity, and subject thereto to the sons of *B.* by *D.* successively in tail male; remainder to the trustees to the use of the issue female of *B.* by *D.*, for raising portions and maintenance until twenty-one; and after raising such sums, or in default of issue female, to the use of the right heirs male of *B.* Held, first, that the words "heirs male" were words of limitation, and gave *B.* the ultimate remainder in fee; and that even if they were words of purchase, they created a remainder contingent during *B.*'s life, which upon his death vested in his heir, by whom it was devisable.

Secondly, that the trustees took at most a limited fee, determinable on the portions being raised; and that after twenty years adverse possession as against them, their right must be presumed to have been satisfied or released.

B. died leaving two sons, who died without issue, and the survivor of whom devised to his wife for life, remainder to the children of *E.* living at the time of his wife's death. At her death nine children of *E.* were living, two of whom in her lifetime had levied fines *sur conusance de droit come ceo* of their shares to *G.* After her death *H.*, a stranger, entered, and six weeks afterwards, while *H.* was in possession, all the children of *E.* conveyed by lease and release and fine to *G.*

Held, first, that the interests of the two who had levied fines, although contingent only, were not thereby extinguished, but passed to *G.* the conusee.

Secondly, that the conveyance by the children to *G.* was valid, without a previous entry by them.

And therefore, thirdly, that *G.* might recover in ejectment against *H.* for all the lands. *Doe* v. *Martyn.* *page* 485

2. A limitation of an estate to the heirs of a party who takes an estate *pur auter vie* or *durante viduitate*, by the same deed, lets in the rule in Shelley's case, so as to vest the estate of inheritance in the grantee *pur auter vie*, although the two estates cannot coalesce. 490 (*c*)
3. The uniting of the life estate with the estate of inheritance not the effect of the rule in Shelley's case, but wholly collateral to it. *ibid.*
4. *A.* seised to him and his heirs for the life of *B.*, devises to *C.* without using words of inheritance:—Held, that on the death of *C.*, living *B.*, the heir of *A.* takes as special occupant. *Doe* d. *Jeff* v. *Robinson.* 249

But see the opinions of Lord Kenyon, Mr. Fearne, and Sir W. D. Evans, *contrà.* 263 (*b*)

II. *Estate of inheritance.*

5. Fee simple determinable. 497 (*a*)

III. *Estate pur auter vie.*

6. Lease to *A.* and his heirs during three lives, assigned to the use of *A.* for life, and to his sons in tail male, may vest in the remaindermen as special occupants. 251 (*d*)
7. Where the estate vests in the executor or administrator, such executor, &c. is seised of the freehold and must be named tenant to the *præcipe* in any recovery or real action. 251 (*c*)
8. Where lands are held in borough English, the estate *pur auter vie* descends to the heir in borough English. 251 (*d*)
9. Comprehended in a devise of "all my freehold lands." 251 (*e*)
10. Rent granted *pur auter vie* determined by death of grantee, if no assignment. 253 (*d*)
11. Lease to *I. S.*, *habendum* to *I. S.*, his executors, &c., for three lives, descends to the heir of *I. S.* *page* 253 (*f*), 254 (*c*)
12. Estate not enlarged by naming the heirs of the grantee. 255, 256
13. No parol demurrer for nonage of heir. 257
14. Descent does not take away entry. 257, 258
15. Improperly called descendible freehold. *ibid.*
16. Entails of, how barred. 258 (*c*)
17. May be limited to *A.* in tail, remainder to *B.* 258 (*d*)
18. *A.*, tenant at will to *B.*, lessee for years under *C.*, tenant *pur auter vie*, would, before statute of frauds, become general occupant, *nolens volens*, upon the death of *C.* 258 (*e*)
19. Words of limitation omitted in pleading an assignment by deed of an estate *pur auter vie.* 259 (*e*)
20. Whether one of several co-heirs may by entry take the whole estate as special occupant, *quære.* 259 (*c*)
21. Not assets in the hands of the heir. 264, *n.*
22. Apparent inconsistency of the existence of general occupancy at common law, with the position that the devise of an estate *pur auter vie* requires words of limitation to pass the whole estate. 264, *n.*, 265, *n.*
23. Devisable to a party and his executors. 265, *n.*
24. No general occupancy of things lying in grant.
25. Whether a rent granted to *A.* for the life of *B.* is extinct upon the death of *A.*, or is preserved in the executors by the statute of frauds, *quære.* 267, *n.*
26. Whether there could be a general occupancy of a copyhold, *qu.* 266, *n.*
27. Provisions of 12th section of statute of frauds, where no special occupant. 262
28. Further provisions of 14 *G.* 2, c. 20, s. 9. 263

IV. *Estate for years.*

And see EXECUTORY DEVISE.—LEASE, 1.

29. No tenancy implied under a party who has not the legal estate. *Morgell* v. *Paul.* *page* 303
30. Tenancy from year to year defeasible upon determination of lessor's estate, 419
31. Or by entry of prior lessee. 540
32. Tenant from month to month may sublet from year to year. 420
33. *B.* holding land of *A.* for a term of years, underlets part to *C.* from year to year. At the expiration of the term *B.* agrees to hold on from month to month:—In the absence of any new agreement between *B.* and *C.* the tenancy from year to year continues. *Peirse* v. *Sharr and another.* 418
34. *A.* in 1819 demises lands to *B.* for one hundred years, and subject thereto he, in 1820, demises for two hundred years to *C.*, who enters. In 1822 *D.* recovers judgment against *A.* *D.* issues and executes an *elegit*, under which the lands are delivered in execution. *C.* is entitled to the possession as against *D.*, it not appearing that *B.* had entered under the demise to him. *Chatfield* v. *Parker.* 540
35. Tenancy from year to year, how determinable where several co-lessors. 434 (*a*)
36. Effect of demise by joint tenants. 434 (*a*), 435 (*a*)
37. Effect of demise by tenants in common. 435 (*a*)

IV. *Customary freehold.*
See 169, 170

V. *Estate at will.*

38. Tenancy how determinable where several co-lessors. 434 (*a*)

VI. *Estate by sufferance.*
See 187.

VII. *Joint tenancy.*

39. Ejectment maintainable on the several demises of joint tenants.

VIII. *Tenancy in common.*
40. Trespass does not lie by one part owner or tenant in common of a party-wall against the other. *Cubitt* v. *Porter.* *page* 267
41. When in such an action the judge left it to the jury, whether the wall was the common property of plaintiff and defendant, and they found that it was a party-wall, and the judge thereupon directed them to find for the defendant:—Held, that such direction was right. *ibid.*
42. Ejectment maintainable upon joint demise of tenants in common. 535

ESTOPPEL.

I. *By deed.*

1. None where interest passes. 420 (*a*)

II. *By Fine.*

See 494.

III. *By judgment in Colonial Court.*

See 581, (*a*).

ESTREAT.

See ELECTION PETITION.

EVIDENCE.

I. *Production of evidence.* And *see* COSTS.—MANDAMUS.—PRACTICE, III.

1. An agreement to purchase peace not admissible to show liability. 463
2. *Quære*, as to the effect where defendant agrees to pay the whole debt demanded, stipulating merely for an abatement of part of the costs. *ibid.*
3. Trustees not compellable to produce evidence against their *cetteux que trust.* 417
4. To entitle a party to an inspection of books, either the books must be of a public nature, or the party desiring to inspect them must have an interest in them. *ibid.*
5. Production of corporation books. *ibid.*
6. Production of parochial books. *ib.*
7. Inspection of court rolls. 128 (*a*)

II. *Upon particular issues.*

8. In an action against the marshal for the escape of a prisoner committed under an attachment for not performing an award, an allegation, that plaintiff and the prisoner referred their disputes to arbitration "by mutual bonds of submission," is a material and necessary allegation, and must be strictly proved; proof of the prisoner only having executed a submission bond, is insufficient. *Brazier* v. *Jones.* *page* 88

9. An issue whether plaintiff was administratrix at the time of the exhibiting of the bill must be found in the affirmative for the plaintiff if the record contain a special memorandum, that the bill was filed on a day subsequent to the grant of an administration, even where such memorandum is irregular and not warranted by the practice of the court. *Wooldridge* v. *Wooldridge.* 431 (*a*)

10. In trover against the sheriff, whose officer has seized the goods of *A.*, as under a *fi. fa.* against *B.*, it is sufficient to produce the warrant without producing the writ; and it lies upon the defendant to shew that no such writ issued. *Gibbins* v. *Phillips.* 238

11. *Semble*, that defendant in an information for a libel may prove the truth of the matters alleged to be false and libellous. *Rex* v. *Bradley.* 152

12. Under not guilty in trespass *quare clausum fregit*, the defendant may entitle himself to the possession as plaintiff's mortgagee for years, or as the lessee of such mortgagee. *Johnson* v. *Howson.* 226

13. Upon the trial of an indictment for disobeying an order of justices, the recital upon the face of the order of the facts giving the magistrates jurisdiction, is not evidence of the existence of such facts. *Rex* v. *Gilkes.* 454

14. Nor is the setting out of an order *in hæc verba* in the indictment a sufficient allegation of the truth of the facts recited therein. *page* 454

III. *Secondary evidence.*

15. An indenture of apprenticeship, 24 years old, the expense of which had been defrayed by the parish, had been sent to the overseers, but was not to be found in the parish-chest, may be presumed to be lost, so as to let in evidence of its contents. *Rex* v. *Stourbridge.* 43

16. In an action by bill on a bill of exchange, falling due after the first day of the term of which the declaration is entitled generally, the plaintiff's attorney may give verbal evidence, that the action was not brought until after the bill of exchange became due, without producing the writ. *Lester* v. *Jenkins.* 429

17. In an action against assignees to recover money wrongfully paid them, the debt having been previously paid to the bankrupt, the latter stated, that from looking at an entry of his own in the plaintiff's book, he had no doubt whatever he had received the money:—Held, sufficient proof of the payment without producing the book. *Maugham* v. *Hubbard.* 5

18. The entry in the book was "*R. L.*," (the bankrupt's initials,) "26*l.*, Maugham," (the plaintiff's name:)—Held, that the bankrupt might speak from his recollection of the entry in the book, as having refreshed his memory, though the book could not be used as evidence for the want of a receipt stamp. *ibid.*

IV. *Presumptive evidence.*

19. In a pedigree persons presumed to be dead are presumed to have died unmarried and without issue. *Doe* d. *Oldnall* v. *Deakin.* 195

20. No tenancy can be implied under a party who has not the legal estate. *Morgell* v. *Paul.* *page* 303
21. Where it appeared that an indenture of apprenticeship, twenty-four years old, the expenses of which the overseers of a parish had paid, was sent to those overseers and was not to be found in the parish chest:—Held, that it might be presumed to be lost, and that secondary evidence of its contents was admissible. *Rex* v. *Stourbridge.* 43

V. *Antiquity of instrument, where proof of authenticity.*

22. A will more than thirty years old proves itself, though the testator died within thirty years. *Doe* d. *Oldnall* v. *Deakin.* 195

EXECUTION.

I. *Fieri facias.*

1. Abandonment of possession under. 536
2. *A.* in March fraudulently and for the mere purpose of protecting the goods, sued out a *fi. fa.* against *B.*, under which *C.*, the then sheriff, seized. In September *D.*, a new sheriff, came into office, to whom a *fi. fa.*, sued out by *E.* against *B.*, was delivered. *D.* did not seize, but suffered *C.* to sell under the first *fi. fa.*, and returned *nulla bona* to the second:—Held, that *D.* was liable to *A.* for a false return. *Lovick* v. *Crowder and another.* 84
3. *A.* obtains a judgment by confession or by *nil dicit* against *B.*, and issues a *fi. fa.*, under which *B.*'s goods are seized; whilst the goods remain unsold in the sheriff's hands, *B.* commits an act of bankruptcy, on which a commission issues. The sheriff, after notice of the commission, sells the goods and pays over the proceeds to *A.* The amount may be recovered from the sheriff, by the assignees of *B.*, as money had and received to their use. *Notley* v. *Buck.* *page* 68
4. Whether the sale by the sheriff after such notice was wrongful and would support an action of trover, *quære.* *ibid.*

II. *Capias ad satisfaciendum.*

5. *Ca. sa.* formerly not awarded where defendant guilty of a mere nonfeasance. 237 (*b*)

EXCEPTION.

See LEASE.

EXECUTORS AND ADMINISTRATORS.

I. *Title of executor.*

1. Vendee of an executor, where there has been no exclusive possession, cannot maintain trover without producing the probate. The original will is not admissible. *Pinney* v. *Pinney.* 436
2. But the estate vests by virtue of the will, and of the will only. 437 (*a*)

II. *Administration bond.*

3. Under the common administration bond, conditioned to make and exhibit a true inventory, administer according to law, make a just account and pay the residue to such person as the ecclesiastical judge shall decree, it is no breach of the condition that the administrator has not paid the residue to the next of kin, unless an ecclesiastical judge has decreed payment. *The Archbishop of Canterbury* v. *Tappen.* 136

III. *Title of administrator, to what period referable.*

4. An issue whether plaintiff was administratrix at the time of the exhibiting of the bill, must be found

in the affirmative, if the record contain a special memorandum, that the bill was filed on a day subsequent to the grant of administration, even where such memorandum is irregular and not warranted by the practice of the court. *Wooldridge* v. *Wooldridge*. 431 (*a*)

5. In trover by an administrator, "not guilty of the premises within six years," is a bad plea, not being equivalent to an allegation that the cause of action did not accrue within six years. *Pratt* v. *Swain*. 350
6. Title of administrator derived solely and originally from the grant of the ordinary, without relation. 437 (*a*)
7. Grant of administration an assignment of the rights of action which accrued in the time of the ordinary. *ibid.*

EXECUTORY DEVISE.

I. *Chattel interest.*

1. Bequest of a term of years to *A.* for life, remainder to *B.*, good as an executory bequest of the term to *B.* on the contingency of *A.* dying within the term.

EXPENSES OF PROSECUTORS.

See COSTS.

EXTORTION.

See 514.

FACULTY.

I. *For a vault.*

See 328.

FALSE RETURN.

See SHERIFF, II.

FEE SIMPLE DETERMINABLE.

See 497, (*a*).

FEME COVERT.

See BARON AND FEME.—MARRIAGE.

1. Not entitled to discharge, where taken in execution upon a judgment entered up after her marriage, but having relation to the first day of the Term in the course of which she was married. *Triggs* v. *Triggs*. 126. n. (*b*)
2. Cannot execute a deed. 509, (*a*)

FIERI FACIAS.

See EXECUTION, 1.

FINE.

I. *Sur conuzance de droit come ceo.*

See ESTATE, 1.

II. *Sur conuzance de droit, tantùm.*

See 503.

III. *Sur render.*

See 511 (*c*).

IV. *Who bound as privies.*

See 511 (*d*).

FOREIGN ATTACHMENT.

1. Proceedings in, where goods are attached in the hands of the garnishee. 565, n.
2. Judgment of appraisement. *ibid.*
3. Inventory and appraisement thereon. *ibid.*

(As to the proceedings where a *debt* is attached, see 1 Wms. Saund. 67; Mann. Dig. 2d ed. 350.)

FOREIGN JUDGMENT.

See 580, 581 (*a*), 586, 588.

FORMEDON.

See 511, (*c*).

FRANCE.

1. Actions not maintainable there by a foreigner on causes of action accruing out of France. *page* 579
2. No proceedings permitted to be taken there upon judgments given out of France. *Boylan* v. *Henry*. 588
3. *Cessio bonorum* in. 577, (*a*), 588, (*d*)

FRAUD.

I. *Medium of proof.*

1. Must be proved by direct evidence. 74

II. *Suppressio veri.*

2. Where *A.*, at the request of *B.* his yearly tenant accepts as tenant in his stead *C.*, who proves to be insolvent, and it appears that *B.*, when he proposed *C.* to *A.*, knew that *C.* had compounded with his creditors, but did not communicate that fact to *A.*: the suppression of such a fact is a fraud in *B.*, and he is still liable to *A.* for the rent. *Bruce* v. *Ruler*. 3

III. *Effects of.*

See CESSIO BONORUM, 3.—MARRIAGE, 1, 2.

FRAUDS, STATUTE OF.

I. *Interest in land.*

1. A grant by a rector to an individual of the exclusive right of burial for himself, his family and friends in a vault under the church is a grant of an easement arising out of land, and cannot be made by parol. *Bryan* v. *Whistler*. 318
2. No action will lie for the disturbance of such a right against a rector; but if it would, case, and not trespass, would be the proper form. *ib.*
3. *Semble*, that a rector has no power to make such a grant even by deed. *ibid.*

II. *Surrender.*

4. Upon a tenancy from year to year, determinable at a quarter's notice, the lessor licences the tenant to quit in the middle of a quarter and the tenant quits, and the lessor accepts possession: this is a surrender by operation of law, destroying the right to rent for the whole or any part of the current quarter. *Grimmann* v. *Legge*. *page* 438

III. *Guarantee.*

5. *Indebitatus assumpsit* not maintainable in respect of a collateral liability. 422, (*b*)

IV. *Estate pur auter vie.*

1. Provisions (by sect. 12) as to devolution, where no special occupant. 162

FREIGHT.

See SHIP, 1, 2.

FRIENDLY SOCIETIES.

See 457.

GAMING.

See BILLS AND NOTES,—WAGER.

GARNISHMENT.

I. *Process of.*

1. Awarded against party having goods in his hands attached under process in the Lord Mayor's Court. 565, n.

GUARANTEE.

See FRAUDS, STATUTE OF, 4.

HABEAS CORPUS.

See BANKRUPT, 7.

HABENDUM.

See DEED.

HEIR.

I. *Liability of heir.*

1. In respect of lands devised. *page* 250, (*a*)

II. *Construction of word "heirs."*

2. A word of limitation, when it merely measures the duration of the estate, and marks the course of its devolution. 492, (*e*)
3. A word of purchase, where it indicates the object of the gift, and measures the duration and marks the course of the estate. *ibid.*
4. A word of purchase and special designation, where used (in an improper sense) to denote a son, child, or other individual not taking *qua* heir. *ibid.*

III. *Effect of the word "heirs" in the grant of an estate pur auter vie.*

See ESTATE, 4. 19.

IV. *Construction of words "heirs male."*

See ESTATE, 1.

V. *Coheirs.*

See ESTATE, 20.

HIGHWAYS.

I. *Composition for statute duty.*

1. The "cause of complaint" against an order of justices upon a surveyor of highways, to pay over composition money under 4 *Geo.* 4, c. 95, does not "arise" until such order is served. *Rex* v. *Justices of Lancashire.* 519
2. Notice of appeal given within six days after such service is valid. *ibid.*
3. Surveyor not bound to attend when the list of persons liable to statute duty is laid before the justices, and therefore not presumed to be present when order made upon him to pay over composition money. *Rex* v. *Justices of Lancashire.* 519

HULL DOCKS.

See Hull Dock Company v. La Marche, *page* 107.

HUNDRED.

See 518.

IGNORANCE.

I. *Of fact.*

See 583, (*a*).

II. *Of law.*

See 583, (*a*).

ILLEGAL CONTRACT, 209, 213, 423

IN PARI DELICTO, 210

IMPOUNDING.

What shall be considered. 536

INDEMNITY BOND.

See 181.

INDIA.

See MANDAMUS.

INDICTMENT.

I. *Pleadings.*

See PLEADING, II.—PLEADINGS, I.

II. *Evidence,*

See PRACTICE, III.

III. *New trial.*

1. Where *A.* is acquitted, and *B.* convicted upon an indictment charging them jointly, *semble*, that the Court cannot grant a new trial to *B.* with-

out setting aside the verdict found in favour of *A.* *page* 407

And see COSTS.

INDUCTION.

See SIMONY, 1.

INFANT.

I. *Capacity*

1. Service of a notice of replevying by an infant, is illegal and void. *Cuckson* v. *Winter.*
2. *Semble,* that an infant cannot be a bailiff or a sheriff's officer. *ibid.*

II. *Protection.*

See ESTATE, 13.

INFERIOR COURT.

I. *Removal of causes from.*

1. A cause remanded to an inferior Court by *procedendo,* cannot be again removed into this Court upon the ground of its alleged importance. *Hayward* v. *Wright.* 366

INFORMATION.

See PLEADING, II.

INHABITANT.

1. Who shall be considered a substantial inhabitant with reference to local offices. *Donne* v. *Martyn.* 98

INNKEEPER.

I. *Liability to guests.*

1. A guest at an inn directs valuable goods to be placed in a public room. If the innkeeper do not require them to be removed to a safer place, he is liable in the event of the goods being stolen. *Richmond* v. *Smith.* 325

INQUEST.

1. A coroner's inquest may be quashed in part for uncertainty, and stand good for the residue. *Ex parte Carruthers, in the matter of the Brunswick Theatre.* *page* 397
2. *Semble,* that there may be a valid custom for the coroner to appoint a deputy, or that such signature may be read as a coroner and deputy steward. *ibid.*
3. Where an inquest was signed "*J. S.* deputy steward and coroner," the Court refused to quash it *in toto* as necessarily void for want of authority. *ibid.*

INSOLVENT DEBTORS.

I. *Opposition to discharge.*

1. An agreement by which *A.*, an opposing creditor of *B.* an insolvent, undertakes to withdraw his opposition on the terms that *A.* shall be sole assignee, and shall in that capacity receive a certain sum within a given time, is void. *Murray* v. *Reeves, gent. one, &c.* 423
2. Effect of discharge of insolvent by consent of opposing creditor. 426

II. *To what demands discharge a bar.*

3. The discharge of an insolvent by *cessio bonorum* in Scotland, is no bar to an action brought by an English creditor in England, for a debt contracted in the latter country, though the plaintiff opposed the defendant's discharge in Scotland; unless he sought relief from the Scotch law, by claiming a distributive share of the insolvent's property. *Phillips* v. *Allan.* 576

INTERESSE TERMINI. 542, n.

INTEREST OF MONEY. 190, (*a*)

I. *Where demandable.*

1. Not expressly reserved by a bill or note, constitutes no part of the debt. 562

2. A bill or note payable on a day certain, carries interest from that day, unless the nonpayment has been occasioned by the negligence of the holder. *Laing, gent. one, &c.* v. *Stone.* *page* 561

II. *Effect of payment.*

See BILLS AND NOTES.

INTRUSION.

I. *Effect of.*

See 495.

INVENTORY.

See EXECUTORS.— FOREIGN ATTACHMENT.

JOINT STOCK COMPANY.

1. *B.*, a member of, and agent for, a joint stock company, sells their goods on a *del credere* commission to *A.* *A.* accepts bills payable to the order of *B.*, which *B.* indorses to the actuary of the company, who indorses them to *C.*, another member. *A.* failing before the bills are due, pays *B.* 10*s.* in the pound on account of the bills: *B.* is not liable to *C.* on the bills, or for money received to his use. *Teague* v. *Hubbard.* 369

JOINT TENANTS.

I. *Demises by.*

1. May demise severally in ejectment. 435

JUDGMENT.

I. *In rem.*

See 581, n.

II. *Of appraisement.*

1. Of goods attached within the city of London, upon process of garnishment out of the Lord Mayor's Court. 565, n.

III. *How revoked for error in fact.* 285, (*c*)

JUSTICES.

JURAT.

See CORPORATION, 1.

JURISDICTION.

And *see* JUSTICES, I.

1. Where an exclusive jurisdiction is given to a Court of Requests over debts not exceeding 5*l.*, with an exception of action for the balance of an account originally exceeding that sum, a party who sells several articles which the vendee treats as forming parts of one account, may sue in the superior Courts, though all the items in the accounts have been satisfied except the last, which does not amount to 5*l.* *Carden* v. *Burford.* *page* 170

JURY.

And *see* PRACTICE, V.

JUSTICES.

I. *Jurisdiction.*

And *see* RATE, 4.

1. Consent of, under 56 *G.* 3, c. 139, to the putting away, &c. of pauper apprentices. 417
2. The borough of Berwick-upon-Tweed is within the purview of 53 *G.* 3, c. 51, s. 24; and the justices may make a rate, in the nature of a county rate, upon the borough. *Rex* v. *The Justices of Berwick-upon-Tweed.* 378
3. Upon the trial of an indictment for disobeying an order of justices, the recital upon the face of the order of the facts giving the magistrates jurisdiction, is not evidence of the existence of such facts. *Rex* v. *Gilkes.* 454

II. *Orders.*

And see pl. 3.

4. An order for the payment to the treasurer of a lunatic asylum of a gross sum for the by-gone maintenance of a pauper lunatic, and of a future

weekly sum, is bad for the former sum. *Rex* v. *Maulden.* *page* 146

5. An order for stopping up a road, reciting, "that the justices have upon their view found, *or* it has appeared to them," that the road is useless or unnecessary, is bad *Rex* v. *Rogers.* 289
6. The "cause of complaint" against an order of justices upon a surveyor of highways to pay over composition money, under 4 *G.* 4, c. 95, does not "arise" until such order is served. *Rex* v. *Justices of Lancashire.* 519
7. Notice of appeal given within six days after such service, is valid. *ibid.*
8. Surveyor of highways not bound to attend when the list of persons liable to statute duty is laid before the justices; and therefore not presumed to be present when order made upon him to pay composition money. *ibid.*

III. *Voting at Quarter Sessions.*

9. Where an appeal against an order of removal is adjourned, on the ground of the justices being equally divided, this Court will not grant a *certiorari*, for the purpose of quashing the order of removal and the order of adjournment, upon affidavits shewing that the apparent equality of votes was occasioned by the vote of a magistrate who was a rated inhabitant of the respondent parish, and had joined in making the order of removal. *Rex* v. *Uske.* 172

KEY.

See INNKEEPER.

LACHES.

See EXECUTION, 3.

LANDLORD AND TENANT.

I. *Terms of holding.*

1. *B.* holding land of *A.* for a term of years, underlets part to *C.* from year to year. At the expiration of the term *B.* agrees to hold on from month to month. In the absence of any new agreement between *B.* and *C.*, the tenancy from year to year continues. *Peirse* v. *Sharr and another.* *page* 418

II. *Liability of landlord for work done on farm.*

2. An agreement by a landlord to pay for the amount of improvements upon the farm, is not evidence of an original liability. 484
3. A landlord being sued for repairs done upon his estate, it is agreed that the tenant shall advance the amount out of the rent, and that the landlord shall pay two-thirds of the defendant's costs. The costs not being paid, the action proceeds. This arrangement is not such an acknowledgment of the defendant's original liability as will entitle the plaintiff to a verdict, even supposing that it is not inadmissible in evidence, as being in the nature of a compromise. *Per Holroyd*, J., and *Littledale*, J.; *dubitante Bayley*, J. *Lofts* v. *Hudson.* 481

III. *Notice to quit.*

4. Where joint lessors are partners in trade, a notice to quit in the names of all, signed by one only, is valid. *Doe* d. *Elliott and others*, v. *Hulme.* 433
5. Upon a tenancy from year to year, determinable at a quarter's notice, the lessor licences the tenant to quit in the middle of a quarter, and the tenant quits, and the lessor accepts possession:—This is a surrender by operation of law, destroying the right to rent for the whole or any part of the current quarter. *Grimmann* v. *Legge.* 438
6. Where not necessary in case of parish house occupied by paupers. 185
7. Notice to quit must be such as either party who receives it can act on.

LAND-TAX.

I. *How assessed.*

See 18.

II. *Payment, how enforced.*

1. Under 38 *G.* 3, c. 5, ss. 2 and 12, land tax for the quarter ending 25th March is due and may be demanded, and, upon default in payment, distrained for at any period during that quarter. *Gibbs* v. *Stead.* *page* 547
2. But when the demand is made in the absence of the party, mere non-payment will not support a distress. *ibid.*
3. A reasonable interval after the demand must be allowed. *ibid.*

LATITAT.

1. Issued and continued on roll, to avoid statute of limitations. 529

LEASE.

I. *Liability of assignee.*

1. Assignee of lessee is not liable for rent accruing after an assignment over, though wrongful. *Paul* v. *Nurse.* 525
2. A covenant by lessee that he, his executors and administrators, shall not assign without licence, is not binding upon assignee of lessee. *Semble.* *ibid.*

LEX LOCI.

See 590, n.

LIBEL.

I. *What shall amount to.*

1. Written slander, tending to bring the plaintiff into public hatred and contempt, is actionable; as when an overseer is charged with oppressive conduct towards paupers, in compelling them to receive payment of their weekly parish allowance in orders for flour upon a particular tradesman. *Woodard* v. *Dowsing.* *page* 74

LICENCE.

See LANDLORD and TENANT, 5.—MARRIAGE, 1.

LIEN.

I. *General.*

1. Goods are at the risk of the owner, not of the party who has a lien on them. 569

LIMITATION OF ACTIONS.

And see SCOTLAND.

I. *How avoided.*

1. Latitat without Bill of Middlesex, good commencement of a suit to avoid the statute. 529
2. So, voidable process is sufficient. 531
3. A payment of interest by *A.* on the joint and several note of *A.* and *B.*, is evidence of a promise by *B.*, and takes the note out of the statute of limitations, though *B.* was a mere surety, and the payment was made without his knowledge. *Burleigh* v. *Scott.* 93

LIMITATION OF ESTATE.

And see ESTATE.

1. Devise "to *A.* for life, and from and after her decease to the surviving children of *B.* and *C.*" The only child of *B.* died during the life of *A.*: Held, that the period of survivorship referred to the death of the testator, and that the heir at law of the deceased child of *B.* was entitled to share with the children of *C.* who survived *A.* *Doe* d. *Long* v. *Prigg.* 538

LUNATIC.

See JUSTICES, 4.

LONDON PAVING ACT.

See 100.

LONDON POOR'S RATE.

See 14. 17, 18.

MANDAMUS.

See BANKRUPT.—COSTS, 1.

I. *For the examination of witnesses.*

1. The Court has no power to refuse a *mandamus*, under 13 *G.* 3, c. 63, s. 44, to examine witnesses in India. *page* 133

MARRIAGE.

1. The marriage of a minor by licence without the consent of parents, &c., required by 4 *G.* 4, c. 75, s. 16, is valid. *Rex* v. *Birmingham.* 230
2. A female pauper married by the fraudulent contrivance of parish officers is legally married, notwithstanding the fraud. *ibid.*

And *see* BARON and FEME.—EVIDENCE, 19.

MARSHAL.

See ESCAPE.

MASTER.

See SETTLEMENT, 1.

I. *Trespass per quod servitium amisit.*

See 477.

MAYOR.

See CORPORATION, 1, 2.

MAYOR'S COURT.

1. Proceedings in the Lord Mayor's Court upon foreign attachment. *page* 565, n.

MISDIRECTION.

I. *Cases where verdicts, &c. set aside on the ground of misdirection.*

1. Grocock *v.* Cooper. 78
2. Gibbins *v.* Phillips. 238

II. *Cases where rules applied for on the ground of misdirection refused.*

3. Bruce *v.* Ruler. 3
4. Maugham *v.* Hubbard. 5
5. Richmond *v.* Smith 235
6. Grimmann *v.* Legge. 438

III. *Cases where rules obtained on the ground of misdirection discharged.*

7. Langdon *v.* Wilson. 10
8. Lovick *v.* Crowder. 84
9. Cubitt *v.* Porter. 237
10. Cuckson *v.* Winter. 313
11. Swann *v.* Earl of Falmouth. 534
12. Laing *v.* Stone. 561

MONEY PAID.

1. Money paid as the price of an illegal act, not recoverable, whether the act be done or not. 210

MORTGAGE.

See EVIDENCE, 12.

MUTUAL CREDIT

See BANKRUPT.

NEGLIGENCE.

1. Negligence in barter of goods pleaded. 185

NEWFOUNDLAND.

See COLONIAL JUDGMENT.

NEW TRIAL.

See INDICTMENT, III.—PRACTICE, VI.

NOTICE.

I. *Of meeting of corporate body.*

See CORPORATION, II.

II. *Not to pay money over.*

See 214.

III. *To quit.*

See LANDLORD AND TENANT.

OCCUPANT.

See ESTATE. 6, 18, 20, 22, 24, 26, 27.

OFFICE.

I. *Eligibility to.*

1. The 11 *G.* 3, c. 29, which renders "substantial inhabitants" of the wards of London eligible to the office of collector of the ward rates, applies to the resident inhabitants only. *Donne* v. *Martyr.* *page* 98

II. *Power to appoint a deputy.*

2. Bailiff for a liberty may appoint a deputy. 316, n.
3. So, a constable. *ibid.*
4. So, a sheriff. *ibid.*
5. So, a coroner. 397
6. But not a sheriff's bailiff. *Semble.* 315, (*c*)

ONUS PROBANDI. 181

See EVIDENCE, 10. 19.

ORDER.

See JUSTICES. I, 3. II.

PARISH HOUSE.

I. *Power of parish officers over.*

See LANDLORD AND TENANT.

PARLIAMENT.

I. *Act of parliament.*

See STATUTE.

II. *Election petition.*

1. The authority of the Speaker with respect to the costs and expenses of witnesses before election committees, under 53 *Geo.* 3, c. 71, extends to witnesses summoned on behalf of the sitting member. *Magrane* v. *White.* *page* 440
2. The Speaker's certificate, describing the party as "a witness summoned, &c." is conclusive evidence that he was summoned as such witness. *ibid.*

PAROL DEMURRER.

See ESTATE, 12.

PARTICEPS CRIMINIS. 212

PARTNER.

And *see* LANDLORD AND TENANT.

1. In contemplation of a dissolution of partnership between *A.* and *B.*, a warrant of attorney is given by *C.* to *A.* to secure a debt owing from *C.* to *A.* and *B.* Before the partnership is actually dissolved, *C.* commits an act of bankruptcy. A sum paid by *C.* to *A.* after the dissolution of partnership on account of the debt, and a further sum levied under an execution against *C.*'s goods, are money received by both *A.* and *B.* to the use of the assignees of *C.* *Biggs* v. *Fellows.* 450
2. *B.*, a member of and agent for a joint stock company, sells their goods on a *del credere* commission to *A.* *A.* accepts bills payable to the order of *B.*, which *B.* indorses to the actuary of the company, who indorses them to *C.*, another mem-

ber. *A.*, failing before the bills are due, pays *B.* 10*s.* in the pound on account of the bills; *B.* is not liable to *C.* on the bills, or for money received to his use. *Teague* v. *Hubbard.* *page* 369

3. *A. B.* and *C.* carried on business in partnership as factors. *A.* and *B.* in England, under the firm of *A. C.* and *Co.*, and *C.* in America, in the name of *C.* only. *C.* had written instructions from his partners stating, "it is understood that our names are not to appear on either bills or notes for the accommodation of others, and that they should appear as little as possible on paper at at all, and then only as regards direct transactions with the house here." *C.* having obtained a consignment from *D.* in America, indorsed bills in his own name for him to provide, for which *B.* drew other bills on *A. C.* and *Co.* in England, which were to be paid out of the proceeds of the consignment. Before the latter bills were presented for acceptance, *A.* and *B.* became bankrupts:—Held, that the indorsement of the first bills by *C.* was the indorsement of the firm, and that all the partners were liable as indorsers of those bills. *Carolina Bank* v. *Case.* 459

PARTY-WALL.

I. *Nature of interest in.*

1. Trespass does not lie for one of the part-owners against the other. *Cubitt* v. *Porter.* 267
2. Where in such an action it was left to the jury to consider whether the wall was the common property of plaintiff and defendant, and they found that it was a party-wall, and the Judge thereupon directed them to find for the defendant:—Held, that such direction was right. *ibid.*

PAUPER.

1. A pauper occupying a parish house by sufferance not entitled to a month's notice to quit under 59 *G.* 3, c. 12, s. 24. *page* 181
2. Declaration on libel charging oppressive conduct towards paupers. 74

PAYMENT.

See BILLS AND NOTES, 11.

PEDIGREE.

See EVIDENCE. 19.

PERICULUM REI VENDITÆ. 567, n.; 569

PERJURY.

See PLEADINGS, 1.

PLEADING.

I. *Declaration.*

1. Upon a verdict on a count containing one good and one bad cause of action the damages are referred to the former. 184
2. *Secus*, where the bad cause of action is in a separate count. *ibid.*
3. Commencement of particular estates, when to be shewn. 335, 543
4. It need not be shewn, where both parties claim under the same particular estate. 543

II. *Indictment.*

5. An indictment stating that *A. B.* gave certain justices to understand and be informed that *C. D.* being a brewer of beer or ale for sale, did neglect, &c. is not supported by an information containing no allegation that *C. D.* was a brewer of beer or ale for sale, together with proof *aliundè* of his being such brewer. *Rex* v. *Leech.* 119

5. The setting out of an order of justices in *hæc verba*, in an indictment for disobeying such order, is not a sufficient allegation of the truth of the facts recited therein. *Rex* v. *Gilkes.* *page* 454

III. *Information.*

6. Information stating that *H.* was a person employed in the service of the Customs, that it was his duty, as such person so employed, to seize certain goods, and the defendant offered to bribe *H.* to violate such duty:—Held, bad in arrest of judgment, for not stating the facts out of which the legal duty arose. *Rex* v. *Everett.* 35

IV. *Inquisition.*

7. A coroner's inquisition may be quashed in part for uncertainty, and stand good for the residue. *Ex parte Carruthers in the matter of the Brunswick Theatre.* 397

8. Where an inquisition was signed "*J. S.*, deputy steward and coroner," the Court refused to quash it *in toto*, as necessarily void for want of authority. *ibid*

V. *General issue.*

9. Under "not guilty," in trespass *quare clausum fregit*, the defendant may entitle himself to the possession as plaintiff's mortgagee for years, or as the lessee of such mortgagee. *Johnson* v. *Howson.* 226

VI. *Special plea.*

10. In trover by an administrator, "not guilty of the premises within six years," is a bad plea, not being equivalent to an allegation, that the cause of action did not accrue within six years. *Pratt* v. *Swaine.* 250

11. A plea in trespass *quare clausum fregit*, stating that plaintiff was tenant to defendant of the close, subject to a reservation to defendant of all pis[illegible] &c. to [illegible] turf. is [illegible] not shewing [illegible] dant's [illegible] menced [illegible] a reservation [illegible] subject of [illegible] *Burt.*

12. A plea in [illegible] mission of [illegible] plaintiff, [illegible] found, adjudged [illegible] bankrupt," [illegible] was in fact a [illegible] *Guinness* v. *Carvl.*

13. A plea of bankrupt[illegible] tiff should state the [illegible] of bankruptcy, and the [illegible] creditor's debt.

14. Whether in debt on [illegible] replication to a plea of [illegible] in the plaintiff after the [illegible] of the cause of action, [illegible] judgment was recovered, [illegible] tiff obtained his certificate [illegible] the judgment was recovered [illegible] allege expressly that the cer[illegible] was obtained after the com[illegible] issued.

15. Form of pleading where [illegible] claimed by prescription.

PLEADINGS.

I. *Indictment.*

1. For perjury upon trial of an exc[illegible] information. 11

II. *Declaration.*

2. On special contract by bailee o[illegible] bills of exchange. 1[illegible]

3. On libel stating oppressive con[illegible] duct towards paupers. 74

4. Against marshal for escape of party attached for non-performance of an award. 88

5. Upon administration bond. 136

6. On decree of Colonial Court of Equity for balance of account between partners. 153

For words imputing felony. *page* 176

In trespass for disturbing plaintiff in possession of a vault. 318

In trover by administrator. 350

In covenant against assignee of lessee. 525

For assisting a tenant in fraudulent removal of goods to prevent a distress. 570

By administratrix, with special memorandum.

III. *Pleas, &c.*

Performance of condition of administration bond. 136

Set-off upon indemnity bond. 181

Justifying the resumption of possession of goods bailed to the plaintiff. 185

In trespass *quare clausum fregit*, that plaintiff was tenant to defendant, subject to a certain reservation (instead of exception) of all pits, with ingress, &c. 335

Not guilty within six years, in trover. 351

Assignment over before breach of covenant; and special replication. 525

Statute of limitations; replication of *latitat* continued by bill of Middlesex. 528

To trespass for mesne profits, judgment and *elegit;* replication a prior demise to plaintiff. 540

POOR'S RATE.
See RATE.

PORTS.
See 113

POSSIBILITY.
See 503.

POTIOR CONDITIO POSSIDENTIS. 211

POWER.

I. *Of attorney.*
See AUTHORITY.

II. *Of limiting an estate.*
See 495.

PRACTICE.

I. *Process.*

1. Upon a writ against two, a declaration against one only is good; but notice of such declaration entitled as against both, is bad. *Evans* v. *Whitehead.* *page* 367
2. A bill of Middlesex is a good continuance of a latitat issued with intent to implead upon the same cause of action. *Page* v. *Newman.* 528

II. *Declaration.*

3. In an action by bill on a bill of exchange falling due after the first day of the term of which the declaration is entitled generally, the plaintiff's attorney may give verbal evidence that the action was not brought until after the bill of exchange became due, without producing the writ. *Lester* v. *Jenkins.* 429
4. *Semble*, that an administrator has no right to entitle his bill and declaration of a day in vacation, for the purpose of making it appear that the bill was filed after administration granted. *Wooldridge* v. *Wooldridge.* 432, n.

III. *Inspection.*

And *see* EVIDENCE.

5. Pending an indictment at the instance of a parish against a county, for not repairing a bridge, the object being to try whether the parish or the county were liable to repair, the Court refused to grant the defendants an inspection of the parish books relating to former repairs of the bridge. *Rex* v. *Inhabitants of Bucks.* 412

6. A bishop's registry of presentations is a public book; and a *mandamus* lies to him to grant inspection of it to one claiming a right to present to a vacant living, though the bishop claim a right to collate to it. *Finch* v. *The Bishop of Ely*. *page* 127

IV. *Warrant of attorney.*

7. The Court has summary jurisdiction over a warrant of attorney alleged to be fraudulent, on the application of any person interested in impeaching it. *Harrod* v. *Benton*. 130

8. A warrant of attorney given to secure a debt due to *A*. and *B*., who are partners, does not alter the nature of the joint credit. *Biggs* v. *Fellows*. 450

9. Although judgment be entered up and execution issued on such warrant of attorney. *ibid*.

10. Nor although such warrant of attorney be given after the dissolution of the partnership between *A*. and *B*. *ibid*.

V. *Jury.*

And see post, VI.

11. A special juror can be challenged for alienage only at the time when the special jury is struck, if at all. *Rex* v. *Despard and others*. 406

12. Non concurrence in verdict by. 216

VI. *New trial.*

13. Where a Judge directs the jury that they are clearly bound to find a verdict for one party, and no objection is taken to the entering of the verdict for that party, the Court will not grant a new trial upon the affidavit of a juryman, stating that the jury had not concurred in such a verdict. *Saville* v. *Lord Farnham*. 216

13. Where a mistaken verdict was given in consequence of the omission of the Judge to draw the attention of the jury to a material feature in the case, the Court imposed the terms of the payment of costs on the granting of a new trial, the Judge not having been requested to enter into a fuller explanation: but the costs of a former trial, where the verdict was set aside for misdirection, and of an intermediate postponement, by making the cause a remanet, were to abide the event. *Gibbins* v. *Phillips*. *page* 238

14. Verdict for less than 20*l*. not disturbed on the prayer of a defendant who would not be entitled to relief except upon payment of costs, unless a question of right involved. 438 (*b*)

15. Where the jury, in returning a verdict, say that they find for the plaintiff as to part of the declaration, the plaintiff will not be allowed the expenses of witnesses called to support a different part, although the verdict be entered for him generally. *Cocks* v. *Peachy*. 420

VII. *Judgment.*

16. Where several defendants are brought up for sentence, some after judgment by default, and others after verdict, the counsel for all must be first heard in mitigation, and then the counsel for the crown in aggravation of punishment. *Rex* v. *Despard*. 406

17. Judgment may be entered up generally for the plaintiff in an ejectment brought for a messuage *and tenement*. *Dyeball* v. *Doe*. 184

VIII. *Execution.*

And see ELEGIT—EXECUTION.

18. A wife sued with her husband for a debt contracted by her while sole, may be taken in execution, though her husband has been discharged from the debt under the insolvent debtors' act. *Sparkes* v. *Bell and Wife*. 124

IX. *Costs.*

19. Where a *mandamus* under 13 *G*. 3, c. 63, s. 44, to examine witnesses in India, the plaintiff having recovered a verdict, is entitled to his costs of cross-examining such witnesses. *Whytt* v. *Macintosh*. 133

PRESUMPTION.

See EVIDENCE, IV.

1. Of a non-existing release. *page* 485

PRINCIPAL.

See AGENT.

PRIVY COUNCIL.

I. *As a court of appeal.*

1. In proceedings before the privy council the party must make out the substance of his claim, but is not tied down to matters of form. 166

PROCESS.

1. Void or voidable. 531
2. How continued. *ibid.*

PROBATE.

See EXECUTORS AND ADMINISTRATORS.

PROCEDENDO.

See INFERIOR COURTS.

PROMISSORY NOTE.

See BILLS AND NOTES.

QUO WARRANTO.

I. *Constitution of elective body*

1. A charter directed that a borough should consist of a mayor, four jurats, and two bailiffs, and that when any jurat or bailiff should die, &c., the remaining jurats and bailiffs, or the greater part of them, of whom the mayor should be one, should elect another or others of the burgesses or inhabitants to be a jurat, &c. One vacancy occurred in the office of jurat, and an inhabitant was elected a jurat by a meeting, at which the mayor, two jurats, and two bailiffs, were present: Held a good election; the rule requiring the presence of a majority of each definite part of the elective body not applying where, in case of one vacancy, viz. in the office of bailiff, it would be impossible for a majority of the bailiffs to be present. *Rex* v. *Greet.* *page* 291

II. *Mode of convening corporation.*

2. Where powers are vested in a select body appointed to be aiding and assisting the mayor, a notice by the mayor to the members of that body to attend a corporate meeting need not specify the purposes for which the meeting is convened; and an election at such meeting is valid. *Rex* v. *Pulsford.* 384

III. *Discretion as to granting quo warranto information after six years' enjoyment.*

3. Where a corporator *de facto* had exercised his office more than six years, the Court in their discretion, without entering upon the question of title, refused to grant a *quo warranto* information against him. *Rex* v. *Brooks.* 389

RATE.

And see COUNTY RATE.—OFFICE, 1.

I. *What property rateable.*

1. Houses built on lands embanked from the Thames, in pursuance of the statute 7 *Geo.* 3, c. 37, which vests those lands in the owners, "free from all taxes and assessments whatever," are not liable to be rated for the relief of the poor. *Rex* v. *City of London Gas Light and Coke Company.* 12

II. *Appeal.*

2. The practice of entering and respiting an appeal against a poor-rate at the next session after its allowance, as a matter of course, with-

out any notice, is not warranted by the 17 *Geo.* 2, c. 38, s. 4. *Rex* v. *Justices of Wiltshire.* *page* 401
3. But where that practice prevails, and an appellant has acted upon it, and the justices at the second sessions refuse to hear the appeal, this Court will issue a mandamus to them to do so *ibid.*
4. The Court of quarter sessions has no power to quash a poor's rate for a defect not pointed out in the notice of appeal, though it be apparent on the face of the rate. *Rex* v. *Bromyard.* 280

RECITAL.

1. Effect of, in statutes. 116

RECORD.

1. Generality of record may be explained by parol. 169

RECOGNIZANCE.

See ELECTION PETITION, II.

RECOVERY.

I. *Tenant to the præcipe.*

1. Of estate *pur auter vie.* 251 (*c*)

See ESTATE.

RECTOR.

I. *Consequences of freehold being vested in.*

1. A grant by a rector to an individual of the exclusive right of burial for himself, his family, and friends, in a vault under the church, is a grant of an easement arising out of land and cannot be made by parol. *Bryant* v. *Whistler.* 318
2. No action will lie for the disturbance of such a right against a rector; but if it would, case, and not trespass, would be the proper form. *ibid.*
3. *Semble,* that a rector has no power to make such a grant, even by deed. *Bryan* v. *Whistler.* 318

REGISTRY.

I. *Of presentations.*

1. A bishop's registry of presentations is a public book. *Finch* v. *Bishop of Ely.* 127

REMAINDER.

I. *Contingent.*

See ESTATE, 1.

II. *Vested.*

See ESTATE, 1.

REMANET.

See COSTS, 2.

REMOVAL OF CAUSES.

1. A cause remanded to an inferior Court by *procedendo,* cannot be again removed into this Court upon the ground of its alleged importance. *Hayward* v. *Wright.* 366

RENT.

I. *Entirety of,*

See 439.

II. *By whom payable.*

1. Assignee of lessee is not liable for rent accruing after an assignment over, though wrongful. *Paul* v. *Nurse.* 525

III. *Remedies for.*

2. May be put in view in assize. 204

IV. *Seisin of.*

3. Necessary to be alleged in a plea claiming rent by prescription. *ibid.*

V. *Granted pur auter vie.*

See 253, (*d*)

REPLEVIN.

See AVOWRY.—DISTRESS.—INFANT.

RESCOUS.

I. *What shall amount to.*

1. Where goods wrongfully taken out of the possession of the distrainor before impounding. *page* 536

RESIGNATION BOND.

I. *Where simoniacal.*

See 206, 207.

RULE IN SHELLEY'S CASE.

1. Intention of settlor defeated in all cases in which the rule operates. 492, (*a*)

And see ESTATE.

SCOTLAND.

1. Within the realm as regards statute of limitations. 584, (*a*)
2. *Cessio bonorum* in. 567
3. Sequestration in, 585

SEA-WALL.

I. *Right to erect.*

1. Persons occupying lands adjoining the sea, may erect such defences as are necessary for the preservation of their own lands although such erection may render it necessary for their neighbours to do the like. *Rex* v. *The Commissioners of Sewers of the Pagham Levels.* 468
2. So, commissioners of sewers for the preservation of land within the level. *ibid.*
3. Nor does any obligation arise to erect works for the protection of such neighbours, or to indemnify them against loss. *ibid.*

SET-OFF. 181. 189.

SETTLEMENT.

I. *By apprenticeship.*

And see post, pl. 12

1. *A.* a parish apprentice, at the suggestion of his master, *B.*, goes to work for *C.* *A.* without the knowledge of *B.*, and without the intervention of two justices, agrees to work with *C.* by the year, and serves *C.* a year under that agreement. *A.* gains no settlement by apprenticeship, because the service is not referable to the indenture, nor by hiring and service, because he was an apprentice illegally put away within 56 *Geo.* 3, c. 139, s. 9. *Rex* v. *Shipton.* *page* 217
2. An indenture of apprenticeship, 24 years old, the expenses of which the overseers of a parish had paid, had been sent to those overseers, and was not to be found in the parish chest: Held, that it might be presumed to be lost, and that secondary evidence of its contents was admissible. *Rex* v. *Stourbridge.* 43
3. An apprentice working with his master during the week in one parish, and sleeping on Saturday and Sunday nights at his master's house in another, may gain a settlement in the latter parish by inhabitancy under his indenture. *Rex* v. *Warden.* 24
4. A verbal agreement by a master "upon being paid 3*l.* to set his apprentice at liberty, and to give him up his indenture," does not discharge the indenture so as to fix the settlement of the apprentice in the parish where he slept last before the making of such agreement. *ibid.*
5. An apprenticeship to two masters to serve them consecutively in distinct trades, is valid, and requires only a single stamp. *Rex* v. *Louth.* 273
6. An indenture, by which a boy under eight years of age is bound apprentice to a chimney sweeper, is absolutely void by 28 *Geo.* 3, c. 48, s. 4; and service under it will not confer a settlement. *Rex* v. *Hipswell.* 474

7. An indenture of apprenticeship of an infant pauper sanctioned by the overseers and magistrates acting *bonâ fide*, is not avoided by its having been fraudulently contrived between the parent and the nominal master for the purpose of obtaining a premium from the parish, and keeping such infant at home. *Rex* v. *Great Sheepy*. *page* 286

II. *By renting a tenement.*

8. Under 59 *Geo.* 3, c. 50, (and before the passing of 6 *Geo.* 4, c. 57,) a settlement was gained by holding for one year at a rent of 11*l.*, a dwelling house, part of which was let at 1*s.* 6*d.* a week to an undertenant, who had no means of access to the rest of the house. *Rex* v. *Great Bolton*. 22

9. Under 59 *Geo.* 3, c. 50, where the settlement rests upon the renting of land of 10*l.* a year, the residence in the parish need not be for more than 40 days; nor is it required to be on the land. *Rex* v. *Waynflete All Saints*. 223

10. No settlement can be acquired under 6 *Geo.* 4, cap. 57, by renting a tenement, unless the entire rent for one whole year, whatever its amount, be actually paid. *Rex* v. *Ashby-de-la-Hay*. 21

11. A party by whom a tenement is hired and occupied, and the rent paid, for a year, gains a settlement under 59 *Geo.* 3, c. 50, although a third person be surety to the landlord for payment of the rent. *Rex* v. *Keyworth*. 28

III. *By hiring and service.*

And see ante, pl. 1.

12. Pauper was "hired" by his uncle a carpenter, "to learn his trade," and was to do any other work as well as that of a "carpenter;" his uncle was to find him part of his food and clothing, but he was to lodge with his father. Pauper served his uncle on these terms five years. At the end of two years it was proposed to draw up indentures, to exempt pauper from the militia; but none ever were drawn up: Held, that this was not a contract of hiring and service, but an imperfect contract of apprenticeship, and that service under it conferred no settlement. *Rex* v. *Combe*. *page* 30

IV. *By Marriage.*

13. The marriage of a minor by licence without the consent required by 4 *Geo.* 4, c. 75, s. 16, is valid. *Rex* v. *Birmingham*. 230

14. A female pauper married by the fraudulent contrivance of parish officers, acquires her husband's settlement. *ibid.*

V. *Emancipation.*

15. Pauper left his father's family at fifteen, and entered the sea service, where he remained till twenty-one: Held, that he was then emancipated, and was settled in the parish where his father was then settled. *Rex* v. *Lawford*. 556

SEWERS.

I. *Authority of Commissioners.*

See SEA-WALL.

SHERIFF.

I. *Warrant.*

1. Form of warrant by. 316, (*a*)

2. In trover against the sheriff, whose officer has seized the goods of *A.* under a *fi. fa.* against *B.*, it is sufficient to produce the warrant without producing the writ; and it lies upon the defendant to shew that no such writ issued. *Gibbins* v. *Phillips*. 238

II. *False return.*

3. *A.* in March, fraudulently, and for the mere purpose of protecting

the goods sued ont a *fi. fa.* against *B.*, under which *C.* the then sheriff seized. In September, *D.* a new sheriff, came into office, to whom a *fi. fa.* sued out by *E.* against *B.* was delivered, *D.* did not seize, but sufferred *C.* to sell under the first *fi. fa.*, and returned *nulla bona* to the second: Held, that *D.* was liable to *A.* for a false return. *Lovick* v. *Crowder and another.* *page* 84

III. *Where protected.*

4. Where a creditor obtains judgment by *nil dicit* against his debtor, whose goods are seized by the sheriff before his bankruptcy but not sold till after it, the Court will not compel the sheriff to pay over the proceeds of the sale to the assignees, although the validity of the commission be not impeached. *Washbourne, in re.* 374

IV. *Extortion.*

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SHIP.

I. *Freight.*

1. Freight *pro ratâ itineris* upon the acceptance of the goods.

II. *Liability of owners.*

2. The owners of a ship, by deed, called a charter-party, appointed *A.* to the command of the ship on a voyage from London to Calcutta, and back. *A.* was to load the ship out and home, and secure to the owners a certain amount of freight, retaining the surplus, or making good the deficiency. An agent of the owners was to go on board to superintend the management of the stores, with power to displace *A.* and appoint another commander, in case of breach of agreement on his part: Held, that the deed was not in point of law a charter-party, so as to release the owners from their liability to make good the loss upon goods sent from Calcutta to London by the ship, and lost or damaged on the voyage. *Colvin and others* v. *Newberry and another.* *page* 47

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1. Resignation bond, where illegal. 206

I. *Effect of.*

1. Induction upon a simoniacal presentation, is void against the presentee of the crown, who upon being inducted may maintain ejectment against the simoniac. *Doe* d. *Watson* v. *Fletcher.* 206

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1. The authority of the Speaker, with respect to the costs and expenses of witnesses before election committees, under 53 *Geo.* 4, c. 71, extends to witnesses summoned on behalf of the sitting member. *Magrane* v. *White.* 440
2. The Speaker's certificate, describing the party as "a witness summoned, &c." is conclusive evidence that he was summoned as such witness. *ibid.*

STAMP.

I. *Agreement.*

1. "You will be pleased to receive the register of the brig *Gratitude*, which I enclose, and which I lodge in your hands as a security for the payment of all demands and charges on account of the said vessel since she has been in this port, and which I hope will be satisfactory to you," is not receivable in evidence, in an action by the writer to recover possession of the register,

without an agreement stamp. *Bowen* v. *Fox.* *page* 167

2. Where the subject-matter of an agreement is a limited interest worth less than 20*l.* in a thing worth more than 20*l.*, the agreement does not require a stamp. *Doe* d. *Morgan* v. *Amos.* 180

3. An agreement that *A.* will sell a ship to *B.*; that part of the price shall be secured by mortgage of the ship; that *A.* will procure the ship to be chartered on a voyage; that the earnings on the voyage shall be paid to *A.* as a part of the price; and that at the end of the voyage the mortgage shall close; is an agreement for and relating to the sale of goods, and requires no stamp. *Meering* v. *Duke.* 121

4. "I have received a bill of exchange, which I hold as your attorney, to recover the value of from the parties, or to make such other arrangement for your benefit as may appear to me in my professional character reasonable and proper," is not an agreement or a receipt, and may be read in evidence without any stamp. *Langdon* v. *Wilson*, Gent. one, &c. 10

II. *Apprenticeship.*

5. An apprenticeship to two masters, to serve them consecutively in distinct trades, requires only a single stamp. *Rex* v. *Louth.* 273

III. *Promissory note.*

6. A promissory note for 11*l.* 10*s.*, made payable "on demand to the bearer, with interest, for value received," requires a 2*s.* stamp by 55 *G.* 3, c. 184, schedule, part 1. *East* v. ——. 8

IV. *Receipt.*

See ante, pl. 4.

V. *Unstamped instruments, for what purposes available.*

7. The payment of money may be proved by a witness speaking from his recollection as refreshed by an unstamped receipt not produced. *Maughan* v. *Hubbard.* *page* 5

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1. Construction of ambiguous enactment. 181

2. Whether penal or remedial. 571

3. Effect of recital. 116

4. Recital prefixed to a particular section not necessarily confined in its operation to that section only. 447

5. No enumeration of sections by the legislature. *ibid.*

6. Where a prohibition is introduced for the benefit of the parties only, the word "void" may be construed to mean "voidable" only. 479

7. *Secus*, where the prohibition is introduced for public purposes; as to protect those who cannot protect themselves. 479, 480

8. An act of parliament imposes wharfage on goods "landed or discharged upon" wharfs at Hull, the amount to be the same as that charged upon goods "loaded or discharged upon" wharfs in the port of London. Wharfage is payable only on goods landed on the wharfs and not on goods shipped from them. *Hull Dock Company* v. *La Marche.* 107

4. A building never yet inhabited, constructed as and intended for a dwelling-house, and used as a barn, is not "a house, out-house, or barn," within 9 *G.* 1, c. 22, s. 7. *Elsmore* v. *Hundred of St. Briavells.* 514

5. To support an action on 11 *G.* 2, c. 19, s. 3, for assisting a tenant in fraudulently removing his goods, with intent to prevent a distress, the defendant must be privy to the fraudulent intent, and must actually assist in the removal. *Brook* v. *Noakes.* 570

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1. A bill accepted for differences on time bargains in stock is valid in the hands of an indorsee. *Greenland* v. *Dyer.* *page* 422

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1. *A.*, a broker for *B.*, sells goods which are in *A.*'s custody to *C.*, to be paid for by the acceptance of *D.* Upon the insolvency of *D.* *A.* obtains from *C.* an order to sell the goods and apply the proceeds to meet the acceptance; *C.* becomes a bankrupt; *A.* delivers the goods to *B.*, who subsequently returns them to *A.*, after which they are demanded by the assignees of *C.* The adoption by *B.* of the act of *A.* in obtaining the order may be inferred; and neither the delivery of the goods to *B.* nor the refusal to deliver them to the assignees amounts to a conversion. *Bailey* v. *Culverwell.* 564

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4. *A* seised to him and his heirs for the life of *B.*, devises to *C.* without using words of inheritance:—Held, that on the death of *C.*, living *B.*, the heir of *A.*, takes as special occupant. *Doe* d. *Jeff* v. *Robinson.* 249

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1. Whether a contract necessary to render occupier liable to an action of debt or assumpsit, *quære*. 439
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USES AND TRUSTS.

I. *Executed by* 27 *Hen.* 8.

1. An estate limited to the use of the issue female of *A.* and *B.* for raising portions, when executed in such issue female, gives them no more than a chattel interest. *Semble.* 487, 496, (*e*)

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I. *In matter of allegation.*

1. Statement in declaration, "I will do my best to transport him, as he has been working for me all the while." Proof, "He has worked for me some time, and has been continually robbing me." Held, no variance. *Dancaster* v. *Hewson.* 176
2. Special facts rendering valid a deferred notice of dishonour, will support the common averment of notice. *Firth* v. *Thrush.* 359

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II. *Period at which bargain complete.*

1. To support an action for goods bargained and sold, there must be either an actual sale of goods existing at the time of the contract, or a specific appropriation of goods afterwards assented to by the buyer. *Atkinson* v. *Bell.* 292

III. *Period at which property vested in vendee.* 566, n.

IV. *Rescinding of contract of sale.*

2. *A.*, as broker for *B.*, sells goods which are in *A.*'s custody to *C.*, to be paid for by the acceptance of *D.* Upon the insolvency of *D.*, *A.* obtains from *C.* an order to sell the goods, and apply the proceeds to meet the acceptance. *C.* becomes bankrupt. *A.* delivers the goods to *B.*, who subsequently returns them to *A.*, after which they are demanded by the assignees of *C.* The jury, or the Court, upon a special case, may infer the adoption by *B.* of the act of *A.* in obtaining the order; and neither the delivery of the goods to *B.*, nor the refusal to deliver them to the assignees, amounts to a conversion. *Bailey* v. *Culverwell.* *page* 564

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I. *Under what circumstances illegality can be insisted on.*

1. *A.* and *B.* deposit with *C.* 20*l.* each to abide the event of a fight between them. After the battle, a dispute as to which is the winner is referred to *D.*, who decided in favour of *B.* *A.* demands the whole 40*l.* from *C.*, and gives him notice not to pay it to *B.* *C.* nevertheless pays over the 40*l.* to *B.* *A.* may recover his own 20*l.* from *C.* as money received to his use. *Hastelow* v. *Jackson.* 209

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I. *Exclusive jurisdiction.*

1. Under 5 *Geo.* 4, c. 106, s. 21, where a verdict is found for less than 50*l.* it is in the discretion of the Judge who tries the cause whether he will testify that the cause of action arose in Wales, and that defendant was resident there at the time of the service of process; and his decision cannot be revised by the Court. *Jones* v. *Kenrick.* 448
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1. In answer to an action upon a bill drawn by the defendant, and by him indorsed to the plaintiff, the acceptor cannot be called to prove that it was indorsed upon a consideration which failed through the default of the plaintiff. *Edmonds* v. *Lowe.* 427
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